INDEX

	Page
Chronological List of Relevant Docket Entries	1
Transcript of Trial (Indictment)	3
Transcript of Trial (Jury Instructions)	4
Opinion of the USCA for the Eighth Circuit, dated April 11, 1972, Breitenstein, J.	16
Judgment of the USCA for the Eighth Circuit	24
Memorandum Decision of the USDC, District of South Dakota, Central Division, dated May 31, 1972	25
Opinion of the USCA for the Eighth Circuit, dated July 27, 1972, Per Curiam	27
Judgment of the USCA for the Eighth Circuit, July 27, 1972.	28
Order of the Supreme Court of the United States granting petion for writ of certiorari, etc., dated December 4, 1972	29

Chronological List of Relevant Docket Entries

March 9, 1971	Complaint filed before U.S. Magistrate in Chamberlain, South Dakota.
March 9, 1971	Warrant issued for the arrest of defendant.
March 10, 1971	Return of Warrant of Arrest and defendant granted an adjournment to seek an attorney. Bond set at $3000.
March 23, 1971	Preliminary hearing held before U.S. Magistrate in Chamberlain, South Dakota.
March 23, 1971	Defendant bound over to U.S. District Court for arraignment and trial.
March 31, 1971	Indictment filed in U.S. District Court. Central Division, South Dakota.
May 11, 1971	Arraignment held and defendant enters plea of not guilty to charge of assault with intent to do great bodily injury.
May 18, 1971	Hearing on motions for suppression of evidence which were denied. Motion for separate trial was granted.
July 20, 1971	Trial held in U.S. District Court with the jury panel of the Western Division in Deadwood, South Dakota.
July 21, 1971	Verdict of Guilty filed.
Sept. 2, 1971	Judgment and sentence of Court entered.
Sept. 7, 1971	Notice of appeal to Eighth Circuit Court of Appeals filed.
Sept. 17, 1971	Motion for leave to appeal as a poor person filed by defendant.
Sept. 17, 1971	Order granting leave to appeal as poor person, also ordering copy of transcript be provided, to the defendant and appointing attorney.
April 11, 1972	Judgment filed by Eighth Circuit Court of Appeals remanding to the District Court for an evidentary hearing.
April 24, 1972	Hearing on Remand held in U.S. District Court in Sioux Falls, South Dakota.
April 27, 1972	Continued hearing concluded in U.S. District Court, Sioux Falls, South Dakota.

May 31, 1972	Memorandum decision filed by Honorable Fred Nichol, C.J., U.S. District Court.
July 27, 1972	Eighth Circuit Court of Appeals affirms District Court Judgment and enters order.
Aug. 28, 1972	Case entered on docket of the Supreme Court under number 72-5323.
Dec. 4, 1972	Writ of Certiorari granted and motion for leave to proceed *in forma pauperis* granted by the Supreme Court.

UNITED STATES DISTRICT COURT, DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION

Transcript of Trial (Indictment)

[130] THE COURT: At this time the United States Attorney may read the indictment, announce the plea of the defendant as to the charge contained therein, and make his opening statement. Mr. Hurd.

MR. HURD: May it please the Court; Mr. Meierhenry. Ladies and gentlemen of the jury. The Grand Jury in and for the District of South Dakota returned an indictment against Francis Ambrose Keeble, which, eliminating the formal portions thereof, reads as follows:

[131] The Grand Jury charges: On or about the 7th day of March, 1971, in Indian country, at Fort Thompson, within the Crow Creek Indian Reservation, a reservation under the jurisdiction of the United States, in the District of South Dakota, Francis Ambrose Keeble and Alfred Milton Kennedy, Indians, without justifiable or excusable cause, did willfully and knowingly assault Robert Isaac Pomani, with intent to inflict great bodily injury, by beating him, in violation of 18 U.S.C. Section 1153 and South Dakota Compiled Laws Section 22-18-12.

To this indictment as returned by the Grand Jury, the defendant, Mr. Keeble, has entered a plea of not guilty.

[313] THE COURT: Ladies and gentlemen of the jury. Most of you [314] have served on one or more of these cases in Federal Court, and you know that the practice differs in Federal Court from state court. In state court you get a copy of the instructions of the Court in writing to look at and read in the jury room. In Federal Court our practice differs. We instruct you orally, and it therefore behooves you to pay very close attention to the oral instructions which the Court is now about to give you.

Now that you've heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court, because regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a [315] verdict upon anything but the evidence in the case.

Justice, through trial by jury, must always depend upon the willingness of each individual juror to find the truth as to the facts from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the Not Guilty plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case,

follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

Now, this is a criminal case. The defendant, Francis Ambrose Keeble, is charged, along with Alfred Milton Kennedy, with the crime of assault with intent to inflict great bodily injury. The substance of the indictment is as follows:

That on or about the 7th day of March, 1971, in Indian country, at Fort Thompson, within the Crow Creek Indian Reservation, a reservation under the jurisdiction [316] of the United States, in the District of South Dakota, Francis Ambrose Keeble and Alfred Milton Kennedy, Indians, without justifiable or excusable cause, did wilfully and knowingly assault Robert Isaac Pomani, with intent to inflict great bodily injury, by beating him, in violation of Federal and state law.

To this charge the defendant Keeble has entered a plea of Not Guilty, which places in issue each material allegation of the indictment.

It is proper to point out that only the defendant Francis Keeble is on trial in this case. There has been some testimony concerning Alfred Kennedy. You are instructed that you are only concerned with the guilt or innocence of Francis Keeble.

You will note that the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

It has been stipulated and agreed in this case that this offense or this occurrence took place within the confines of the Crow Creek Indian Reservation, in Indian country, in the District of South Dakota; and that the [317] defendant, Francis Keeble, is an Indian, thereby giving this court jurisdiction of this action, so you will need not, in your deliberations in this case, give any particular attention to those elements of the charge.

Briefly, it is the contention of the government that the defendant, Francis Ambrose Keeble, an Indian, along with Alfred Milton Kennedy, another Indian, on or about the 7th day of March, 1971, on the Crow Creek Indian Reservation, without justifiable or excusable cause, assaulted

Robert Isaac Pomani, with intent to inflict great bodily injury, by beating him.

The defendant contends that said assault was in self-defense, and while in a state of intoxication, and that the defendant Keeble had no intent to inflict great bodily injury on Mr. Pomani.

You are cautioned that there is no contention by the government that the beating in question resulted in the death of the victim. In fact there is medical testimony to the effect that the death was the result of exposure. The defendant is not charged with beating Pomani to death, but only with beating with intent to inflict great bodily injury.

It is provided by statute that whoever assaults another with intent to inflict great bodily injury is guilty of a felony. [318] As defined by statute, an assault is any willful and unlawful attempt or offer, with force or violence, to do corporal or bodily hurt to another.

The phrase "great bodily injury" as used in the statute means something more than a slight bodily injury or battery; it means a bodily injury of a grave and serious nature.

An assault with intent to do bodily harm is justifiable when committed by any person in the lawful defense of such person, when there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished.

Such assault is excusable when committed by accident and misfortune, upon sudden and sufficient provocation, provided that no undue advantage is taken nor any dangerous weapon used.

The defendant has interposed the defense of self-defense. Now the Court is going to instruct you on the law as to self-defense. You are instructed that as a matter of law, the defense of self-defense is a legal defense; and that if the defendant, Francis Keeble, at the time of the assault, was not the aggressor, and had reasonable cause to believe and did believe from the acts or conduct of the deceased person, Robert Pomani, that the [319] deceased had a design to take his, that is, Keeble's, life or to do him, that is, Keeble, great bodily injury, then the defendant Keeble would be justified in acting in self-defense; that in defense of himself, the defendant could use all the force and means which he believed

to be reasonably necessary and which would appear to a reasonable person in the same or similar circumstances to have been necessary to protect himself.

The important question in practically every case in which self-defense is relied upon is: was the beating of the deceased because of an honest and reasonable belief that it was necessary to save his life, that is, Keeble's life, or save Keeble from imminent danger of great personal injury, or was it by reason of anger or in retaliation for some injury or indignity previously received. A person has a right to defend himself in all imminent danger, but he has no right to wreak a vengeance for some real or fancied wrong that may have been done him.

It is incumbent on the defendant to show justification where his claim is self-defense. This does not mean he must prove his defense beyond a reasonable doubt. If there is in your mind a reasonable doubt as to whether the beating was committed in justifiable self-defense, then the defendant is entitled to an acquittal; but if you are satisfied beyond a reasonable doubt that the beating was not justifiable in self-defense, then you should disregard such defense altogether.

A person may defend his home or habitation against anyone who manifestly intends or endeavors, in a violent or riotous manner, to enter that home or habitation, or who remains there after having been requested to leave, and who appears to intend violence to any person in that home.

The amount of force which the person may use in resisting such trespass is limited by what would appear to a reasonable person, in the same or similar circumstances, necessary to resist the violent or unlawful entry. He may resist force with force, increasing it in proportion to the intruder's persistence in violence, if the circumstances which are apparent to the homeowner are such as would excite similar fears and a similar belief in a reasonable person.

A person who is threatened with an attack that justifies the exercise of the right of self-defense, as I've explained it to you, need not retreat. In the exercise of his right of self-defense, he may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge, and he may pursue his assailant

until he has secured himself from [321] danger, if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.

Although intoxication or drunkenness alone will never provide a legal excuse for the commission of a crime, the fact that a person may have been intoxicated at the time of the commission of a crime may negate the existence of a specific intent.

So, evidence that a defendant acted or failed to act while in a state of intoxication is to be considered in determining whether or not the defendant acted, or failed to act, with specific intent, as charged.

If the evidence in the case leaves the jury with a reasonable doubt whether, because of the degree of his intoxication, the mind of the accused was capable of forming, or did form, specific intent to commit the crime charged, the jury should acquit the accused.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

In a case where two or more persons are charged with the commission of a crime, as in this case, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged.

[322] The statute reads: Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or to disregard the law.

In order to aid and abet another to commit a crime, it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about, that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed.

You of course may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense, as defined in these instructions, was committed by some person or persons, and that the defendant participated in its commission. Mere presence at the scene of the crime and knowledge that a crime is being committed [323] are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant was a participant, and not merely a knowing spectator.

The crime charged in this case is a serious crime, and requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Now, intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

[324] The purpose of adding the word "knowingly" in the indictment was to insure that no one would be convicted for an act done because of mistake, or accident, or other innocent reason.

As stated before, with respect to the offense charged in this case, specific intent must be proved beyond reasonable doubt before there can be a conviction.

"Unlawfully" means contrary to law. So, to do an act "unlawfully" means to do willfully something which is contrary to law.

The essential elements of the offense of assault with intent to inflict great bodily injury, each of which must be

proved by the government beyond a reasonable doubt, are, first, that the defendant Keeble, at the time and place alleged in the indictment, committed an assault or aided and abetted Alfred Kennedy in committing an assault upon the person of another, and second, that the same was committed with the specific intent on the part of the defendant Keeble to inflict great bodily injury and without justifiable or excusable cause.

Evidence has been introduced that the defendant made a certain statement substantially admitting the crime charged to certain government agents. Before you take into consideration as evidence said statement, you must first find that before making the statement that first, [325] defendant was informed he had a right to remain silent, and that anything he said could be used against him;

And second, that the defendant was informed he had a right to have counsel present at the interview;

And third, that the defendant was informed if he could not afford counsel, counsel would be furnished him without cost.

If no counsel was present at the time the alleged statement was made by the defendant, the government must prove to your satisfaction beyond a reasonable doubt that the defendant intelligently and understandingly waived the right to have counsel present at the interview.

In addition to making the foregoing findings before you take into consideration the alleged statement in evidence, you must also find that the statement was voluntary, in accordance with the next instruction which I will now give you.

With respect to any statements, oral or written, in the nature of an admission or confession, the jury must weigh such statements with caution, and scrutinize the circumstances surrounding them to determine whether they were made freely and voluntarily. If the jury finds that such statement was made freely and voluntarily by the defenddant, with knowledge of the nature of such statements or statement, and without fear or coercion, either physical [326] or psychological, or promise of reward, the jury may consider this statement, together with all the other evidence, in determining the innocence or guilt of the defendant.

However, if the jury finds that the statement was not made freely and voluntarily by the defendant, the jury should disregard the statement entirely. Of course you can always consider the other evidence even if you disregard the statement.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." And I'm thinking now of Dr. Vose. Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely.

[327] Now, the law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

Now, the burden of proving a defendant guilty beyond a reasonable doubt rests upon the government. This burden never shifts throughout the trial. If the government fails to prove the defendant guilty beyond a reasonable doubt, the jury must acquit him.

Now, a reasonable doubt is a fair doubt, based upon reason and common sense, and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is never to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evi-

dence produced, but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every [328] essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, the jury should adopt the one of innocence.

An indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence, such as the testimony of an eyewitness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury must [329] be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them, and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Anything you may have seen or heard outside the courtroom, and any evidence to which an objection was sustained, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

[330] You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

[331] After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely

concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible.

Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated [332] before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I [333] think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

Upon retiring to the jury room, you will select one of your number to act as your foreman. The foreman will preside over your deliberations, and will be your spokesman here in court.

Only one form of verdict has been prepared for your convenience. It reads as follows: We, the Jury, find the defendant, Francis Ambrose Keeble, —and then there's a

blank space—of assault with intent to inflict great bodily injury, as charged in the Indictment. When you have unanimously agreed, your foreman will write in the word either "Guilty" or "Not Guilty" in the blank space, and then sign and date the verdict.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the Marshal, and never attempt to communicate with the Court except in writing. And bear in mind always that you are not to reveal to the Court or any person how the jury stands, numerically or otherwise, on the question of the [334] guilt or innocence of the defendant, until after you have reached a unanimous verdict.

I'll ask counsel to aproach the Bench, please.

(Respective counsel then aproached the Bench, and the following record was made:)

THE COURT: I'll inquire of counsel for the government if he has any objections to the instructions.

MR. HURD: The government has no objections and takes no exceptions to the Court's instructions.

THE COURT: I'll inquire of counsel for the defendant if he has any objections to the instructions.

MR. MEIERHENRY: No objections to the instructions as given, but does object to the fact that there isn't an instruction on simple asault.

THE COURT: The Court takes into consideration in ruling on that objection that Section 1153 of Title 18 of the United States Code, which lists the ten, now thirteen, major crimes in Indian country, does not include the crime of simple assault; and that therefore this court has no jurisdiction over the crime of simple assault, that being a matter for the tribe; and therefore, the Court overrules the objection for failure to instruct on the question of simple assault. Anything else?

MR. MEIERHENRY: No.

THE COURT: Very well.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1529

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE, v. FRANCIS A. KEEBLE, DEFENDANT-APPELLANT.	Appeal from the United States District Court for the District of South Dakota.

Submitted: February 17, 1972.

Filed: April 11, 1972.

Before BREITENSTEIN,* BRIGHT, and STEPHENSON, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Defendant-appellant Keeble was found guilty by a jury of assault on one Pomani with intent to commit great bodily injury, in violation of 18 U.S.C. § 1153 and S.D.C.L. § 22-18-12. He was sentenced to five years imprisonment. Defendant and Pomani were both Indians. The assault took place on an Indian reservation in South Dakota.

On March 6, 1971, defendant and Pomani had spent some time drinking and had gone to defendant's home on the reservation. A fight between them ensued. When defendant went to bed, Pomani was in the house and conscious. When defendant awakened, Pomani was not in the house and his body was found outside. Defendant and his wife reported the incident to Captain Cruse, an employee of the Bureau of Indian Affairs and a police officer at the reservation. A post-mortem revealed that Pomani died of exposure.

The first question raised is the admission in evidence of defendant's confession. The surrounding circumstances

* Of the Tenth Circuit, sitting by designation.

are these. After defendant reported the incident, Captain Cruse arrested him for disorderly conduct, a tribal offense, about 8:30 A.M., March 7, and gave a *Miranda* warning. Questioning was not pursued because of defendant's intoxicated condition and nothing pertaining thereto was received in evidence at the trial. At about 10:30 A.M. Cruse called Agent Breci of the Federal Bureau of Investigation and reported Pomani's death. Agent Breci arrived from Sioux Falls, South Dakota, approximately 160 miles away, about noon on March 8. After giving a *Miranda* warning, the agent interrogated defendant for about three hours and received a written statement which incriminated defendant in the beating of Pomani.

On March 9, defendant was brought before the Tribal Court and pleaded guilty to the tribal offense. On the same day Breci swore to a complaint charging defendant with a federal offense. Defendant was brought before a magistrate on March 11. A motion to suppress the statement given to the FBI agent was denied and the statement was received in evidence.

A period of about 99 hours elapsed between defendant's arrest and his appearance before the magistrate. Rule 5(a), F.R.Crim.P., requires an arresting officer to "take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." Defendant argues that 99 hours does not satisfy the "unnecessary delay" requirement and requires the suppression of the statement.

If the time of the arrest be taken as that when Captain Cruse had probable cause to hold defendant for a federal offense, about 25½ hours elapsed before the beginning of the FBI interrogation and about 28½ hours before the completion of the defendant's written statement. About 70 hours later, he was taken before a magistrate. The delay was apparently ignored by the trial judge who, so far as we can ascertain from the record, based his denial of the motion to suppress on the ground that the statement was voluntarily given after a sufficient *Miranda* warning.

We must determine whether the defendant's waiver of *Miranda* rights obviates compliance with Rule 5(a) and

the requirements of *McNabb* v. *United States,* 318 U.S. 332, and *Mallory* v. *United States,* 354 U.S. 449. In *Miranda* v. *Arizona,* 384 U.S. 436, 463, n. 32, the Supreme Court said that its decision therein does not indicate that the *McNabb-Mallory* rules "can be disregarded." We agree with *Frazier* v. *United States,* D.C.Cir., 419 F.2d 1161, 1166, n. 25, that *Mallory* does not require exclusion of an otherwise admissible statement because of brief delay in obtaining a *Miranda* waiver. The same principle was followed in *O'Neal* v. *United States,* 5 Cir., 411 F.2d 131, cert. denied, 396 U.S. 827, and *Pettyjohn* v. *United States,* D.C.Cir., 419 F.2d 651, in each of which there was a short interval between the arrest and the statement. That is not the case here and the *Miranda* warning did not cure the delay in taking the defendant before a magistrate.

Rule 5(a) applies only to persons arrested and held under federal law. *United States* v. *Elliott,* 8 Cir., 435 F.2d 1013, 1015. The government says that defendant was arrested for disorderly conduct, a tribal and not federal offense, and that at the time of the FBI interrogation he was being lawfully held for the tribal offense. The arresting officer, Captain Cruse, was a federal employee working for the Bureau of Indian Affairs. Decisions considering federal interrogation of a suspect lawfully in state custody are not pertinent because here defendant at all times was in federal custody.

Cruse made the arrest under the Code of Indian Tribal Offenses, 25 C.F.R. § 11.49. The government urges that Rule 5(a) is inapplicable because the FBI interrogation occurred while defendant was under lawful detention for the tribal offense. See 25 C.F.R. § 11.17. In spite of the arrest for the tribal offense, we believe that no later than 10:30 A.M. on the 7th Cruse had probable cause to arrest defendant for violation of 18 U.S.C. § 1153, and at that time the arrest also became one for probable violation of that section. It is irrelevant whether Cruse made a specific statement to that effect. *Brown* v. *United States,* D.C.Cir., 365 F.2d 976, 979.

The statement was obtained by an FBI agent who had 15 years experience in working with Indians. We are convinced that the *Miranda* warning was fully, fairly, and adequately given and that the execution of the waiver by

the defendant was given knowingly and voluntarily. Our concern is the effect of the delay of more than one day between the arrest and the statement and of almost three days between the statement and the appearance before the magistrate.

This brings us to the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197. Title II thereof, 18 U.S.C. § 3501, relates to the admissibility of confessions. Subsection (a) says that confessions are admissible if voluntarily given; that the judge, out of the presence of the jury, shall determine voluntariness; and that if voluntariness is found the statement may be received in evidence and considered by the jury under appropriate conditions and instructions.

Subsection (b) provides that in determining voluntariness, the judge shall take into consideration "all the circumstances surrounding the giving of the confession" including five specified items, one of which is the time lapse between arrest and arraignment if the confession was made between them. The statute says that the presence or absence of any of the enumerated factors "need not be conclusive on the issue of voluntariness of the confession."

Subsection (c) says that a confession is not made inadmissible solely because of delay in bringing the accused before a magistrate if (1) the trial judge finds that the confession was voluntary, (2) the weight to be given the confession is left to the jury, and (3) the confession was made "within six hours immediately following his arrest or other detention" with this proviso:

> "That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer."

In the case at bar, the submission of the confession to the jury satisfied the requirements of subsection (a). Likewise, the factors mentioned in subsection (b), with the exception of the time lapse between arrest and confession, were considered by the trial judge in his determination

that a proper *Miranda* warning had been given. The trial judge did not comply with the proviso of subsection (c).

The defendant makes no attack on the constitutionality of § 3501 and we proceed on the basis that it is constitutional. The pertinent legislative history is given in *United States* v. *Halbert,* 9 Cir., 436 F.2d 1226, 1233-1236, and need not be repeated here. In *Halbert* there was more than a six-hour delay between arrest by state officers and confession to a federal agent. The trial court suppressed the confession because the delay was beyond that permitted by § 3501(c). On the government's appeal, the Court of Appeals reversed. It said (Ibid. at 1231):

> "* * * it is obvious that the prime purpose of Congress in the enactment of § 3501 was to ameliorate the effect of the decision in Mallory v. United States * * *, to remove delay alone as a cause for rejecting admission into evidence of a confession and to make the voluntary character of the confession, the real test of its admissibility."

The court held that a delay of more than six hours before confession was a factor to be taken into consideration; that the confession was voluntary; that the delay after the confession was not pertinent; and that the trial court erred in suppressing the confession solely because of the delay. Ibid. at 1237.

Unlike *Halbert* our situation is not the exclusion of a confession for the sole reason of a greater than six-hour delay. Rather, our problem is the admission of the confession without any consideration of the delay factor.

More pertinent is this circuit's decision in *Grooms* v. *United States,* 8 Cir., 429 F.2d 839. That had to do with a greater than six-hour delay between state arrest and federal interrogation. The prime concern was whether there was a working arrangement between the state and federal officers. The court held that there was none. The short reference to § 3501(c), Ibid. at 843, says only that it does not broaden the scope and effect of *McNabb, Mallory,* and Rule 5(a) or nullify "the body of case law which has sanctioned the in-custody interrogation and the subsequent arraignment that was followed in this case." Ibid. Our reading of the opinion convinces us that the reference to "the body of case law"

relates to the problem of working arrangements which is not present in the instant case. We believe that *Grooms* must be confined to the facts then before the court; it did not eliminate the delay factor from consideration in the determination of voluntariness.

Bright v. *United States*, 8 Cir., 274 F.2d 696, concerned a *McNabb-Mallory* problem arising before the enactment of § 3501. The court commented that the basis of application of the *Mallory* exclusion is "not an abstract measuring of time * * * but a scrutiny of whether the statement in its circumstances seems to be the product of artificial delay." Ibid. at 697. The court went on to say (Ibid. at 698):

> "Application of the McNabb rule thus involves a scrutiny and evaluation by the trial court of whether the circumstances and incidents of a statement made by a prisoner, as related to time and opportunity for taking him before a commissioner, constitute the statement as a product of improper encroachment on his right to such an appearance."

Bright recognizes that delay may be a factor in determining voluntariness and is relevant to the treatment of delay within the framework of § 3501. *Grooms* did not overrule *Bright*.

Subsection (c) of § 3501 provides the method for treatment of delay. It complements subsections (a) and (b), and does not say that a delay of more than six hours makes the confession automatically inadmissible. After consideration of the delay between arrest and confession, a court may still find that the confession is voluntary under § 3501(b) and admit it under § 3501(a). See discussion by Professor Wright in 1 Fed. Pract. & Proc. 74-76. We agree with *Halbert*, *supra*, 436 F.2d at 1237, that post-confession delay is not pertinent to the determination of voluntariness.

In the case at bar the record shows no consideration by the trial judge of the delay factor's effect, if any, upon the voluntariness of the confession and to determination of reasonableness as provided by subsection (c). In the circumstances the case must be remanded for consideration of the delay factor in accordance with § 3501.

Defendant moved to suppress photographs taken of his home by officers on the morning of his arrest. The motion

was denied and the photographs received in evidence. The pertinent facts adduced at the hearing on the motion to suppress are these. Defendant and his wife came to the home of Captain Cruse early in the morning. Both were intoxicated. The wife said that defendant had killed her brother and she knew it because defendant had said that he did. Cruse arrested defendant for disorderly conduct. Cruse and two other officers then went to the defendant's premises. From the highway they saw a body in a field and went to it. On examination they found that it was Pomani, that he was dead, and that he appeared to have been severely beaten. The body was 57 feet from the house. One of the officers went to the house, looked in a window, and observed a state of great disarray and "blood all over the floor." The door was ajar and no one was home. One of the officers obtained a camera and pictures were taken of the condition of the house. No search warrant had been obtained. The arrest of the defendant had occurred at Fort Thompson, some distance away.

The thrust of the defendant's argument is that the approach to and entry of the house was an unwarranted search in violation of the Fourth Amendment and the principles stated in *Collidge* v. *New Hampshire*, 403 U.S. 443. We take a different view. The officers had been told that a man had been killed. They went to the premises and found a body which exhibited severe beating. They then conducted an investigation of the immediate area which took them to the side of the house where through the window they saw confusion and blood stains. Their entry through a partly opened door was incident to the discovery of the body and practically contemporaneous therewith. The pictures taken depicted the scene of the crime. We find no Fourth Amendment violation and agree that the pictures were properly received in evidence.

Defendant's argument that the trial court should have instructed the jury on the lesser included offense of simple assault is foreclosed by *Kills Crow* v. *United States*, 8 Cir., 451 F.2d 323.

The case is remanded to the district court for further proceedings to determine the voluntariness of the confession in the light of the requirements of § 3501. After such hearing as may be appropriate, the court shall make its findings

and conclusions and promptly transmit them, with a transcript of whatever hearing is held, to this court. This court retains jurisdiction for all other purposes.

BRIGHT, Circuit Judge, concurring:

I join in Judge Breitenstein's opinion except for the treatment of the search and seizure issue. I retain reservations about the validity of the warrantless search and seizure under Fourth Amendment standards. *See United States* v. *Goldenstein*, No. 71-1294 (8th Cir., March 23, 1972); *Root* v. *Gauper*, 438 F.2d 361 (8th Cir. 1971). Nevertheless, I would not reverse this conviction because I find the error to be harmless beyond a reasonable doubt.

STEPHENSON, Circuit Judge, (dissenting).

I maintain the view expressed in my dissent in *Crow* v. *United States*, 451 F.2d 323, 327 (CA8 1971), that once a federal court properly acquires jurisdiction over a federal crime, it possesses jurisdiction over any crime which is necessarily included therein. For this reason, I would reverse on the lesser offense issue. However, I join the majority in its disposition of the other questions presented by this case.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1529 UNITED STATES OF AMERICA, APPELLEE, vs. FRANCIS A. KEEBLE, APPELLANT.	Appeal from the United States District Court for the District of South Dakota.

JUDGMENT—[Filed, Apr. 11, 1972, Robert C. Tucker, *Clerk*]

This Cause came on to be heard on the original files of the United States District Court for the District of South Dakota and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that this cause, be, and is hereby remanded to the said District Court for further proceedings consistent with the majority opinion of this Court this day filed herein.

APRIL 11, 1972

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CR71-23C

UNITED STATES OF AMERICA,
PLAINTIFF

vs.

FRANCIS A. KEEBLE,
DEFENDANT

MEMORANDUM DECISION—May 31, 1972

Messrs. R. D. HURD and ROBERT D. HIARING, Assistant United States Attorneys, appeared in behalf of the plaintiff;

and

MR. MARK MEIERHENRY, of Rosebud, South Dakota, appeared in behalf of the defendant.

On April 24, 1972, a hearing on remand of this case was held pursuant to the order of the Eighth Circuit Court of Appeals in United States v. Keeble, Criminal No. 71-1529 (8th Cir., April 11, 1972). At the hearing evidence was taken concerning the effect of the delay between probable cause for arrest and confession, and the delay between probable cause for arrest and the arraignment, as the same affects the voluntariness of the defendant's confession. Evidence was also taken concerning the reasonableness of that delay in light of 18 U.S.C.A. Sec. 3501(c).

The Court finds that under the provisions of 18 U.S.C.A. Sec. 3501(c), the delay was not reasonable. Section 3501(c) provides that if the delay between "arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency" and the "bringing (of) such person before a magistrate" is more than six hours it can be reasonable only if "the means of transportation and the distance to be traveled to the nearest available" magistrate are the cause for the delay. Here the nearest United States Magistrate was 25 to 30 miles from Fort Thompson at

Chamberlain. The two towns are connected by a paved highway making travel by automobile readily accessible. Upon these facts a delay of 25½ hours to 28½ hours between probable cause for arrest and defendant's confession was not reasonable. The lapse of 99 hours between probable cause for arrest and defendant's appearance before a magistrate also was not reasonable.

The unreasonableness of the lapse of time between arrest and confession and between arrest and arraignment is not conclusive on the issue of the voluntariness of a confession, and this Court finds that from a complete review of the record herein that defendant's confession was voluntary. Keeble knew the nature of the offense of which he was suspected at the time of making the confession. He knew and was advised that he did not have to make a statement and that if he did it could be used against him. He knew he had a right to an attorney. Defendant was familiar with the Fort Thompson jail, he was detained in a reasonably adequate and livable cell, and he was not coerced or threatened. From a totality of the circumstances the Court finds the confession of Francis A. Keeble to have been voluntarily given.

Done and entered at Sioux Falls, South Dakota, this 31st day of May, 1972.

BY THE COURT

/S/ FRED J. NICHOL
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1529

UNITED STATES OF AMERICA, APPELLEE, vs. FRANCIS A. KEEBLE, APPELLANT.	Appeal from the United States District Court for the District of South Dakota

Submitted: February 17, 1972.

Filed: July 27, 1972.

Before BREITENSTEIN,* BRIGHT, and STEPHENSON, Circuit Judges.

PER CURIAM.

We remanded this case to the district court for further proceedings to determine the voluntariness of the confession in the light of the requirements of 18 U.S.C. § 3501. The trial court conducted an evidentiary hearing and held that the delay between the probable cause for arrest and the defendant's confession was not reasonable; that such unreasonableness is not conclusive on the issue of the voluntariness of the confession; that the defendant was aware of his rights; that he was not coerced or threatened; and that from "a totality of the circumstances" the Court finds the confession to have been voluntarily given. We have considered the record and agree. In our opinion non-compliance with § 3501(c) does not of itself render the confession inadmissible. Such non-compliance is a factor, along with others, which must be given consideration by the trial court.

Affirmed.

* Of the Tenth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1529

UNITED STATES OF AMERICA,
APPELLEE,

VS.

FRANCIS A. KEEBLE,
APPELLANT.

JUDGMENT—July 27, 1972

APPEAL FROM the United States District Court for the ——— District of South Dakota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ——— District of South Dakota and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

SUPREME COURT OF THE UNITED STATES

No. 72-5323

FRANCIS A. KEEBLE,
PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to question 2 presented by the petition which reads as follows:

> "2. Whether the District Court's refusal to give a lesser included offense instruction under 18 U.S.C. 1153 violated the Fifth Amendment's due process guarantee."

DECEMBER 4, 1972

☆ U.S. Government Printing Office: 1973—493-328/461

PETITIONER'S BRIEF

MICHAEL RODAK, JR

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5323

FRANCIS A. KEEBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

PETITION NOT PRINTED
RESPONSE NOT PRINTED

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. Jurisdiction Over Crimes Committed Within an Indian Reservation Is Determined by Federal Law But the Definition of the Crime Is the Definition of the State Wherein the Crime Occurred	5
A. Congress, Alone, Has the Power To Determine What Courts Shall Have Jurisdiction Over Crimes Committed Within an Indian Reservation	5
B. Following the *Crow Dog* Decision, Congress Created the Jurisdictional Pattern by Act of Congress, March 3, 1885, Which Is Presently in Force and Under Which the Petitioner Was Tried	9
C. Although Jurisdiction To Try the Petitioner Is Federal, the Federal Court Must Look to State Law To Define the Alleged Crime	13
D. Congress Intended that South Dakota Law for the Crime Assault with Intent To Do Bodily Injury Be Used and the State Statute Should Be Read To Include Lesser Offenses To Fulfill the Intent of Congress	16

II. But for the Jurisdictional Question, the Facts of This Case Are Clear that a Lesser-Included Offense Instruction Would Be Given as Requested in Federal Courts 17

III. The Due Process Clause of the United States Constitution Is Supreme and Other Enactments of Statute Must Give Way if in Conflict to the Individual's Constitutionally Protected Rights 21

CONCLUSION 26

TABLE OF AUTHORITIES

Cases:

American Tobacco Company v. Werckmeister, 207 U.S. 284, 28 S.Ct. 72 (1907) 17

Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676 (1959) 24

Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946) 26

Berra v. United States, 351 U.S. 131, 76 S.Ct. 685 (1956) 18

Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954) 25

Ex Parte Crow Dog, 109 U.S. 556, 3 S.Ct. 396 (1883) 7, 8, 9

Ex Parte Gon-Shay-Ee, 130 U.S. 343, 9 S.Ct. 542 (1889) 12, 24

Kills Crow v. United States, 451 F.2d 323 (8th Cir., 1971) cert. denied, 405 U.S. 999 . . . . . 22, 23, 24, 25

Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781 (1945) 22

McCall v. United States, 1 Dak. 320, 46 NW 608 (Terr. Dak. 1876) 1

Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149 (1937) 22

People v. Odell, 1 Dak. 197, 46 NW 601 (Terr. Dak. 1875) 15, 16

Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952) 22

Sansome v. United States, 380 U.S. 343, 85 S.Ct. 1004 (1965) 18, 19

Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330 (1934) 22

Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839 (1896) 18

United States v. Bramblett, 348 U.S. 503, 75 S.Ct. 504 (1955) 17

United States v. Campos-Serrano, 430 F.2d 173 (7th Cir., 1970), 92 S.Ct. 471 (1971) 16

United States v. Celestine, 215 U.S. 278, 30 S.Ct. 93 (1909) 26

United States v. Comer, 421 F.2d 1149 (D.C. Cir. 1970) 18, 21

United States v. Crow Dog, 3 Dak. 196, 14 NW 437 (1882) 6, 7

United States v. Huff, 442 F.2d 885 (D.C. Cir. 1971) 18

United States v. Kagma, 118 U.S. 375, 6 S.Ct. 1109 (1886) 11

United States v. Keeble, 459 F.2d 757 (8th Cir. 1972) 24

United States ex rel O'Connor v. State of New Jersey, 405 F.2d 632 (3rd Cir., 1969), cert. denied Yeager v. O'Connor, 395 U.S. 923, 89 S.Ct. 1770 (1969) 21

United States v. Rider, 282 F.2d 476 (9th Cir. 1960) 15

United States v. Sinclair, 444 F.2d 888 (D.C. Cir. 1968) 18

United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971) 18, 19

Walker v. United States, 418 F.2d 1116 (D.C. Cir. 1968) 18

Westmoreland v. United States, 155 U.S. 545, 15 S.Ct. 243 (1894) 26

United States Statutes:

Treaty of April 29, 1868, 15 Stat. 635 8

Treaty of February 24, 1869, 15 Stat. 635 6

Act of Congress, June 1, 1872, 17 Stat. 198 18

Act of Congress, February 28, 1877, 19 Stat. 254 8

Act of Congress, March 3, 1885, 23 Stat. 385 11

Criminal Code:

18 U.S.C. 1153 . . . . . *passim*
18 U.S.C. 3242 . . . . . 11, 14, 21, 25

Miscellaneous:

Congressional Record, House, 1885, p. 935 10
South Dakota Complied Laws, 1967, 22-18-12 . . . . . 13, 20
South Dakota Complied Laws, 1967, 23-45-23 16
United States Code and Administrative News, 1966 . . . 14, 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5323

FRANCIS A. KEEBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit (App. 16) is reported at 459 F.2d 757.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 27, 1972. The petition for a

writ of certiorari was placed on the docket August 28, 1972. A writ of certiorari was granted on December 4, 1972. The jurisdiction is founded upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Court's refusal to give a lesser included offense instruction under 18 U.S.C. 1153 violated the Fifth Amendment's due process guarantee.

STATUTE INVOLVED

18 U.S.C. 1153 as amended April 11, 1968, Public Law 90-284, Title V, Section 501, 82 Stat. 80, provides:

OFFENSES COMMITTED WITHIN INDIAN COUNTRY

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent

to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

STATEMENT

On May 21, 1971, petitioner was found guilty of 18 U.S.C. 1153, assault with intent to inflict great bodily harm, upon Robert Pomani. The crime occurred on the Crow Creek Indian Reservation in South Dakota. The petitioner appealed the conviction to the Eighth Circuit Court of Appeals which after remanding the case to the district court for an evidentiary hearing, affirmed. (App.27).

The Petitioner contended at trial and on appeal that he should have been given a lesser-included offense instruction of assault. Both the district and circuit court denied the lesser-included instruction on jurisdictional grounds.

SUMMARY ARGUMENT

Petitioner, an American Indian, was tried under a unique jurisdictional statute. The statute vests in federal courts jurisdiction over thirteen crimes committed by an Indian upon an Indian Reservation. The specific crime under which the petitioner was charged is defined by state law under this unique federal statute. Under state law and Rule 31(c) of the Federal Rules of Criminal

Procedure, petitioner should have been given a lesser-included offense instruction at trial. The lower court denied petitioner's request on the grounds that federal courts have jurisdiction over the major crimes but are without jurisdiction over the lesser offenses. Thus, no lesser-included offense instruction can be given to the jury.

Petitioner contends that the Due Process Clause of the United States Constitution is violated by the lower court's refusal to instruct on lesser offenses. First, the petitioner contends that the intent of Congress was to have Indians tried in the same manner as all others in federal courts. In refusing to instruct, the lower courts have misconstrued the intent of Congress for trial of Indian people.

If the petitioner's contention that Congress intended to have lesser-included instructions is incorrect, petitioner urges this Court to find 18 U.S.C. 1153 as applied violates the Due Process Clause of the Fifth Amendment. Whatever may be the historical relationship of the Federal Government and Indian tribes, the petitioner as a citizen is protected by the Constitution and should be tried as an equal to other citizens in Federal Courts.

The result of the jurisdictional scheme of Congress is to provide Indian persons committing certain crimes upon Indian reservations less than the full protection of the law. This Indian petitioner contends that when tried for a crime against the United States he must be tried in the same manner as all other persons. If under the federal statutes, he cannot be tried in the same manner; the protection of the Fifth Amendment's Due Process Clause must strike a conviction under those statutes.

ARGUMENT

I.

JURISDICTION OVER CRIMES COMMITTED WITHIN AN INDIAN RESERVATION IS DETERMINED BY FEDERAL LAW BUT THE DEFINITION OF THE CRIME IS THE DEFINITION OF THE STATE WHEREIN THE CRIME OCCURRED.

A. Congress, Alone Has the Power To Determine what Courts Shall Have Jurisdiction Over Crimes Committed Within an Indian Reservation.

On October 18, 1876, Jack McCall was "indicted on the federal side of the district court for the murder of William Hickok, alias 'Wild Bill'." The indictment charges that the offense was committed in the Sioux Indian Reservation at a place in said reservation called "Deadwood." *McCall v. United States*, 1 Dak. 320, 46 N.W. 608 (Terr. of Dak. 1876). Jack McCall was found guilty of shooting "Wild Bill" and was sentenced to death by hanging on January 3, 1877. McCall on appeal contended that he should have been tried in the territorial side of the court rather than in the federal side of the territorial court. The Supreme Court of Dakota Territory answered Jack at page 613, "[a]s to the objection that the defendant should have been indicted and tried on the other side of the court, it is well settled that a trial for homicide committed in an Indian Reserve must be on the federal side of the territorial court, and is governed by United States Statutes and the rules of common law."

Six years later the Supreme Court of Dakota Territory heard another defendant who like Jack McCall objected to the jurisdiction of the trial court but on different

grounds, Crow Dog's (in Lakota, Kan-Gi-Shun-Ca) contention was that neither the territorial side nor the federal side of the Dakota Court had jurisdiction over him for the crime of murder.

Crow Dog was found to have killed Chief Spotted Tail near Rosebud on the Great Sioux Reservation in August of 1881. It is ironic that the Supreme Court of Dakota Territory cited a treaty signed by Spotted Tail to vest jurisdiction over his murderer Crow Dog. The Court found that the Treaty proclaimed February 24, 1869 (15 St. 635) provided:

> "if bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong doer to the United States, to be tried and punished according to its laws" *United States v. Crow Dog,* 3 Dak. 196, 14 N.W. 437 (1882).

Prior to this treaty the Court found that there was no jurisdiction. The Court explained:

> "the act of Congress (Rev. St. 2145) extending the crimes act to the Indian Country contains in section 2146 these exceptions: It shall not extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian Country who has been punished by the local law of the Tribe, or to any case where by treaty stipulation the exclusive jurisdiction over such offense is or may be secured to the Indian Tribes respectively" *United States v. Crow Dog,* supra, 14 N.W. at 437.

The Dakota Court found that the treaty was the equivalent of an Act of Congress. The treaty therefore operated to repeal the exception of Rev. Stat. 2145 and applied the general rule to the Brule Sioux of which Crow Dog was one. The Dakota Court held:

> "The exception of Indians committing crimes against other Indians is general. This treaty and agreement takes these Indians out of such exception, and applies to them the general rule. Any other view would deny them the right guaranteed by solemn treaty, and would make the covenant of the government a mockery". *United States v. Crow Dog*, supra, 14 N.W. at 438.

Crow Dog also objected to instructions on burden of proof. The trial judge's charge to the jury was held proper. The Supreme Court of Dakota Territory found the proper charge to be: "if they had a reasonable doubt of which of the two degrees of criminal homicide he was guilty they must give him the benefit of such doubt, and convict, if at all, of the lesser, to-wit, manslaughter." *United States v. Crow Dog*, supra, 14 N.W. at 440.

Unlike Jack McCall, Crow Dog's case did not end with the Supreme Court of Dakota Territory. The Supreme Court of the United States overruled the Dakota Court in *Ex Parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396 (1883). Justice Matthews first explained the territorial court structure:

> "In the present case the Sioux Reservation is within the geographical limits of the Territory of Dakota, and being excepted out of it only in respect to the territorial government the district court of that territory within the geographical boundaries of whose district it lies, may exercise jurisdiction under the laws of the United States over offenses made

punishable by them, committed within its limits. [excluding authority] The district court has two distinct jurisdictions. As a territorial court it administers the local law of the territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has all the authority of circuit and district courts, so that, in the former character, it may try a prisoner for murder committed in the territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life; (laws Dak. 1883, c. 9;) and, in the other character, try another for a murder committed within the Indian Reservation, under a law of the United States, which imposes, in case of conviction, the penalty of death." *Ex Parte Crow Dog,* 109 U.S. at 600, 3 S.Ct. at 398 (1883)

The Supreme Court found that the offenses occurred within Indian Country and that the United States had jurisdiction under Section 2145, Rev. St., generally. Noting that Section 2146, Rev. St., excepted Indian persons from Section 2145, Rev. St., the Court stated the issue to be decided: "The argument in support of the jurisdiction and conviction is, that the exception contained in section 2146, Rev. St., is repealed by the operation and legal effect of the treaty with the different tribes of the Sioux Indians of April 29, 1868, (15 Stat. 635;) and an Act of Congress, approved February 28, 1877, 19 St. 254," *Ex Parte Crow Dog,* 109 U.S. at 562; 3 S.Ct. at 400.

In overruling the Supreme Court of Dakota Territory, the exception (Section 2146, Rev. St.) being "special and express" and the words of the treaty "relied on as a repeal are general and inconclusive" the court found that the statute was still valid. Since a general act is not to be

construed to repeal a previous particular act, the United States had no jurisdiction over Crow Dog. *Ex Parte Crow Dog,* 109 U.S. at 570, 571, 3 S.Ct. at 405.

As of December 17, 1883, the law in Dakota was settled. Non-Indian persons committing any crimes in Indian Country made unlawful by Congress were to be tried on the federal side of the territorial court. Crimes committed within Indian Reservations by one Indian upon another were for the tribe's disposition.

B. Following the *Crow Dog* Decision, Congress Created the Jurisdictional Pattern by Act of Congress, March 3, 1885, Which Is Presently in Force and Under Which the Petitioner Was Tried.

Congress was besieged with demands for legislation that would eliminate the exception of Section 2146, Rev. St. The Secretary of the Interior in his annual report of 1884 requested legislation. During debate in the House of Representatives Congressman Cutcheon quoted from the Secretary's report:

> I again desire to call attention to the necessity for legislation for punishment of crimes on the Indian Reservation. Since my last report, the Supreme Court of the United States decided in the case of 'Ex Parte Crow Dog,' indicted for murder, that the district court of Dakota was without jurisdiction, when the crime was committed on the reservation by one Indian against another. If offenses of this character can not be tried in the courts of the United States there is no tribunal in which the crime of murder can be punished. Minor offenses may be punished through the agency of the 'court of Indian offenses' but it will hardly do to leave the punish-

ment of the crime of murder to a tribunal that exists only by the consent of the Indians on the reservation. If the murder is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some of his kinsmen—the laws of the State or territory wherein the reservation is situated ought to be extended over the reservation and the Indians should be compelled to obey such laws and be allowed to proclaim the protection thereof. Congressional Record—House p. 935, 1885.

Congress acted upon the request of the Secretary of the Interior. Congress by amendment to the Indian Appropriation Bill Act, Congress March 3, 1885, added c. 341 section 9 which read:

That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without the Indian Reservation, shall be subject therefor to the laws of said territory relating to said crimes, and shall be therefore in the same courts, and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above described crimes against the person or property of another Indian or other person, within the boundaries of any state of the United States, and within the limits of any Indian Reservation, shall be subject

to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States. 23 Stat. 385.

This act was held to be constitutional in *United States v. Kagma,* 118 U.S. 375, 6 S.Ct. 1109 (1886). This act is the origin of 18 U.S.C. 1153, as amended, and of 18 U.S.C. 3242, as amended. This act of 1885 was novel in two important jurisdiction features. First, the act asserted jurisdiction over Indians within states of the Union if on Indian Reservations. Secondly, it subjected Indians to trial in the territorial side of the territorial courts. In Dakota Territory as of March 3, 1885, an Indian committing the seven crimes enumerated would be tried on the territorial side under the laws of Dakota.

Thus if Crow Dog had committed the same acts for which he stood trial prior, he would, after March 3, 1885, have been indicted in the territorial side of the Dakota Court and would have been tried by the laws of Dakota. The jurisdictional scheme remained until South Dakota became a state of the union in 1889. Upon statehood, the jurisdictional scheme as it now exists was created.

Prior to March 3, 1885, the law of the Tribe was the supreme authority over acts considered criminal under the Common Law within Indian Reservation. The change to the Indian person in Dakota territory was therefore immense. The Supreme Court of the United States' view of the purpose of the act: "... is very clearly a continuation of the policy upon which congress entered several years previously, of attempting, so far as possible, and consistent with justice and existing obligations, to reduce the Indians to individual subjection to the laws of the country, and dispense with their tribal relations." *Ex*

Parte Gon-Shay-ee, 130 U.S. 343, 350, 9 S.Ct. 542, 544 (1889).

The case of *Ex Parte Gon-Shay-ee* fully explains the purpose of the March 3, 1885 Act. The petitioner in that case contended that he should not have been tried on the federal side of the Territory of Arizona's courts. The Supreme Court agreed stating through Justice Miller.:

> The framers of this act were very careful, . . . where the offense was committed within the territorial limits of a state, to declare that a violation of the laws of the United States in regard to these crimes of murder, etc., should be tried in the Courts exercising the jurisdiction of the United States to punish offenses against the United States. With regard to the territories, however, it is different. The declaration is that Indians shall be tried by the courts of the territory, and according to its laws, and shall be subject to the penalties which those laws prescribe. They are to be tried in the same manner and in the same courts as are all other persons charged with the commission of said crimes, respectively, and the said courts are given jurisdiction in all such cases. *Ex Parte Gon-Shay-ee*, supra, U.S. at 352, S.Ct. at 545.

During the period after March 3, 1885 that Dakota remained a territory, the laws of Dakota in all respects governed the trial of Indians for the "7 Major Crimes." If an Indian person were indicted for "assault with intent to kill," he must be tried in the "same manner" as all other persons. He would have been given a lesser included offense instruction.

All Indian persons after South Dakota's statehood in 1889 who committed crimes within the boundaries of an Indian Reservation within the State were to be tried by the Federal Courts.

The petitioner, Francis Keeble, was tried in Federal Court under the Federal Rules of Criminal Procedure. He requested a lesser-included-offense instruction and it was denied. (T.p. 334; App. p. 15).

C. Although Jurisdiction To Try the Petitioner Is Federal, the Federal Court Must Look to State Law To Define the Alleged Crime.

The petitioner was charged by indictment which in part read that he was "in violation of 18 U.S.C. 1153 and South Dakota Complied Laws 22-18-12." Congress has expanded the original "7 Major Crimes" to "13 Major Crimes." The original seven are defined and punished under federal statutes. The additional six obtain their definition and punishment from the law of the State wherein the crime occurred. The punishment of two of the later six, rape and assault with intent to commit rape, is governed by 18 U.S.C. §1153 but the definition of crime is that of the state.

The petitioner is, therefore, charged as follows under the pertinent statutes in the indictment:

> 18 U.S.C. 1153: "Any Indian who commits against the person . . . of another Indian or other person . . . assault resulting in serious bodily injury . . . within the Indian Country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section . . . assault resulting in serious bodily injury . . . shall be defined and punished in accordance with the laws of the State in which such offense was committed."
>
> S.D.C.L., 1967, 22-18-12: "Whoever assaults another with intent to inflict great bodily injury shall

be punished upon conviction thereof, by imprisonment in the state penitentiary for not less than one year nor more than five years, or in the county jail not exceeding one year, or by fine not exceeding $500, or both such fine and imprisonment."

The crime of "assault resulting in serious bodily injury" was added to section 18 U.S.C. 1153 by Act of Congress April 11, 1968, 82 Stat. 73. Title V "Offenses Within Indian Country." reads as follows:

Section 501 Section 1153 of Title 18 of the United States Code is amended by inserting immediately after "weapon," the following; "assault resulting in serious bodily injury."

It should be noted that 18 U.S.C. 3242 was not amended. 18 U.S.C. 3242 was last amended by an Act of Congress, November 2, 1966, 80 Stat. 1100. It now includes all the offenses save the one petitioner is charged with in the indictment. The petitioner would contend that Congress in error did not amend 18 U.S.C. 3242 in 1968 when the additional offense was added. Each of the other twelve offenses being contained in 18 U.S.C. 3242 as amended and the last crime added being excluded it is clear that this was due to oversight and not intent.

The intent of Congress as to the importance of defining the crime in language of state statutes is best illustrated in the Senate Report which accompanied passage of the 1966 amendments. *U.S. Cong. and Admin. News,* 1966, p.3653. In that report, Congress noted that the Courts had limited the scope of rape to its common law meaning thereby excluding carnal knowledge. The report states:

"[t]he courts in construing these provisions (18 U.S.C. 1153) have held in a line of decisions that,

> notwithstanding the fact that the statute states that the offense of rape is to be defined in accordance with the laws of the state, the section is to be interpreted as limiting the scope of the offense to its common law meaning" *U.S. Code and Admin. News*, 1966, p. 3655.

The report then noted the decision in *United States v. Rider*, 282 F.2d 476 (9th Cir. 1960), in which the Court found that a "literal application of the statute" limited federal jurisdiction to the common law definition of rape. The bill was intended to "clarify the law in several areas of criminal justice and thereby provide for a more logical and fair administration of criminal justice. . . ." *U.S. Code and Admin. News*, 1966, 3656.

Congress reacted by including the offense of carnal knowledge. Congress' intent is clear from this report that crimes are to be defined according to state law. Further, that the crime need not be mentioned in 18 U.S.C. 1153 if the state definition encompasses the other offenses under the general terminology. Since assault with intent to do bodily injury "ex necessitate" includes assault in South Dakota, Congress intended that Federal Courts have jurisdiction over this crime as well. *People v. Odell*, 1 Dak. 197, 46 NW 601, 602. The Law of Dakota has been clear since the Supreme Court of Dakota Territory declared in 1875:

> It therefore seems to be the settled law that a defendant tried on indictment for assault and battery with intent to kill, may be convicted either of the crime charged or of an assault and battery with intent to do bodily harm, or for a simple assault. *People v. Odell*, 1 Dak. 197, 46 N.W. 601, 603 (1875).

The Dakota Court in this case of first instance further stated:

> That the man who commits the crime of assault and battery with intent to kill, *ex necessitate* has also committed the lesser offense of an assault and battery, and an assault with intent to do bodily harm, and when charged with the higher might be convicted of either of the lower, Section 402 of the Code of Criminal Procedure [Now S.D.C.L., 1967, 23-45-23] provides that "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of any attempt to commit the offense. *People v. Odell,* supra, 46 N.W. at 602.

D. Congress Intended that South Dakota Law for the Crime Assault with Intent To Do Great Bodily Injury Be Used and the State Statute Should Be Read To Include Lesser Offenses To Fulfill the Intent of Congress.

Petitioner contends that under the state definition of the crime charged, assault is included. The intent of Congress is clear that the state definition is to be used. Therefore, the petitioner upon request should have been given the lesser included offense instruction of assault.

"If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered." *United States v. Campos-Serrano,* 430 F.2d 173 (7th Cir. 1970), 92 S.Ct. 471, 474 (1971). "That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest

possible meaning in complete disregard of the purpose of the legislature." *United States v. Bramblett,* 348 U.S. 503, 510, 75 S.Ct. 504, 508 (1955).

An absolutely literal reading of 18 U.S.C. 1153 is at war with the congressional intent.

> "In construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law the legislature intended to enact" *American Tobacco Company v. Werckmeister,* 207 U.S. 284, 293, 28 S.Ct. 72, 74 (1907).

The statute should therefore read to include the state interpretation which includes assault within the crime charged in the indictment.

II.

BUT FOR THE JURISDICTIONAL QUESTION, THE FACTS OF THIS CASE ARE CLEAR THAT A LESSER-INCLUDED OFFENSE INSTRUCTION WOULD BE GIVEN AS REQUESTED IN FEDERAL COURTS.

On lesser included offense instructions, the Supreme Court last stated:

> The basic principles controlling whether or not a lesser included offense charge should be given in a particular case have been settled by this Court. Rule 31 (c) of the Federal Rules of Criminal Procedure provides in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged' thus, [i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the

> evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense. *Sansome v. United States*, 380 U.S. 343, 349, 85 S.Ct. 1004, 1009 (1965); citing, *Berra v. United States*, 351 U.S. 131, 76 S.Ct. 685 (1956); *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839 (1896).

This quotation from *Sansome v. United States* outlines the federal law on lesser included offense instructions. Rule 31(c) of the Federal Rules of Criminal Procedure carries forth the Act of June 1, 1872 article 9, 17 Stat. 198.

"Thus, in an appropriate case, failure to grant an instruction on a lesser included offense requested by the defense is reversible error" *United States v. Comer*, 421 F.2d 1149, 1153, (D.C. Cir. 1970). Most lower federal courts are generous with instructions " . . . [i]f counsel asks for a lesser included offense instruction it should be freely given." *United States v. Sinclair*, 444 F.2d 888, 889 (D.C. Cir. 1971). See also: *Walker v. United States*, 418 F.2d 1116 (D.C. Cir. 1968); *United States v. Huff*, 442 F.2d 885 (D.C. Cir. 1971). "If the evidence is such that a jury can rationally—and is likely—to choose the lesser offense, then the interests of justice call for the defense to have the option of the lesser included offense—whether the prosecution chose to put it in the indictment or has the right later to request it or not." *United States v. Whitaker*, 447 F.2d 314, 321 (D.C. Cir. 1971).

In the *Whitaker* case, the District of Columbia Circuit set five conditions which must be met to give a lesser included offense. This circuit's conditions appear to be the most expanded test:

1. "a proper request must be made,"
2. "the elements of lesser offense must be identical to part of the elements of the greater offense,"
3. "there must be some evidence which would justify conviction of the lesser offense,"
4. "the proof on the elements or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense,"
5. "in general the chargeability of lesser included offenses rests on a principle of mutuality, that if proper, a charge may be demanded by either the prosecution or defense."

United States v. Whitaker, supra, at 317.

Petitioner's situation fulfills the tests in *Sansome v. United States* and *United States v. Whitaker*. Following the order of the *Whitaker* decision, each of the five conditions must be decided in favor of a lesser-included offense in this case.

A proper request was made in the form of objection to the exclusion of an instruction on assault. (T. 334, App. 15) The trial judge in overruling the objection for failure to instruct stated:

> The Court takes into consideration in ruling on that objection that Section 1153 of Title 18 of the United States Code, which lists the ten, now thirteen, major crimes in Indian Country, does not include the crime of simple assault; and that therefore this court has no jurisdiction over the crime simple assault, . . . (T. 334, App. 15).

The objection was properly made and denied therefore the first part of the test is met.

The elements of the lesser offense are identical to part of the elements of the greater offense charged in this case. As 18 U.S.C. 1153 demands, the crime of assault resulting in serious bodily injury is defined in accordance with state law. The definition of SDCL 1967, 22-18-12 is such that the lesser crime of assault is a part of the elements of the larger crime. The element not included is intent. The trial court defined assault for the jury. (T. 318, App. 6) The crime of assault must be present as well as the additional element of intent to inflict great bodily injury.

The jury could properly find that an assault did take place. Defendant placed evidence into the record from his testimony that would justify conviction of assault. He admitted striking Robert Pomani. (T. 229) The defense offered did not deny that an assault took place. The petitioner stated that the assault took place in self-defense. (T. 224, T. 252) The petitioner further denied that he ever intended to injure Robert Pomani seriously. (T. 242-243, T. 249)

The jury was instructed that "the defendant contends that said assault was in self-defense, and while in a state of intoxication, and that the defendant Keeble had no intent to inflict great bodily injury on Mr. Pomani." (T. 317, App. 6) The jury could have properly found that the petitioner assaulted Mr. Pomani but had no intent to inflict great bodily injury. The element of intent was in dispute and the jury could find consistently that the greater offense was not committed and the lesser was. The fourth element of the test is present.

The crimes fall within the fifth part of the test on mutuality. The crimes are such that the greater fails if the lesser is not present. All elements of the greater are

included in the lesser except one–intent to do serious bodily injury.

The petitioner were he not an Indian charged under 18 U.S.C. 1153 under federal law would have been given a lesser-included offense instruction. Failure to give such instruction where proper is error. *United States v. Comer*, 421 F.2d 1149 (D.C. Cir. 1970). The only basis for such denial is the race of the defendant. "A defendant in a criminal case is as entitled to a proper determination of the degree of guilt as he is to a determination of the question of guilt itself." *United States ex rel O'Connor v. State of New Jersey*, 405 F.2d 632, 638, (3rd Cir. 1969), cert. denied; *Yeager v. O'Connor*, 395 U.S. 923, 89 S.Ct. 1770 (1969).

III.

THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IS SUPREME AND OTHER ENACTMENTS OF STATUTE MUST GIVE WAY IF IN CONFLICT TO THE INDIVIDUAL'S CONSTITUTIONALLY PROTECTED RIGHTS.

To petitioner's knowledge, this case raises for the first time in this Court the question whether the denial of a lesser included offense instruction when proper violates the Due Process Clause. If this Court should find that such denial violates the Due Process Clause and also find that Congress so intended to deny such instructions by enactment of 18 U.S.C. 1153, petitioner contends that 18 U.S.C. 1153 is unconstitutional. Petitioner's view is that the lower courts have ignored the intent of Congress. Congress did not intend to accord Indian defendants less rights than others but in 18 U.S.C. 3242 took care to insure such rights as Due Process. Petitioner's view of this

case is that the District Court has jurisdiction to try the matter and instruct on all offenses included within.

The Fifth Amendment to the Constitution provides that the petitioner shall not be tried and sentenced "without due process of law." Due Process is violated either in procedure (Rule 31 F. Rules Cr. Procedure) or substance (jurisdiction 18 U.S.C. 1153) by not allowing lesser included offense instructions to be given to American Indians tried in Federal Courts under the "13 Major Crimes."

> Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offense" Malinski v. New York, 324 U.S. 401, 416, 65 S.Ct. 781, 789 (1945).

The Due Process Clause is a Constitutional safeguard for persons of all races who are American citizens. "Due Process of Law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' *Snyder v. Massachusetts*, 291 U.S. 97, 105, or are 'implicit in the concept of ordered liberty' *Palko v. Connecticut*, 302 U.S. 319, 325" *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 208 (1952).

The Eighth Circuit Court of Appeals in the *Kills Crow v. United States*, 451 F.2d 323 (8th Cir. 1971), cert. denied 405 U.S. 999, 92 S.Ct. 1262 (1972) recognized

"that section 1153 is founded upon a racial classification." *Kills Crow*, supra, at 325. The majority of the Court concluded: "we think that the particular discriminatory effect relied upon here over balances the value of leaving with the tribal courts jurisdiction over such offenses." *Kills Crow*, supra, at 327. The Eighth Circuit in reaching this result noted that historical guardian-ward concept. It further noted that "the Indian population itself has demonstrated its objection to interference with the tribal court system" *Kills Crow*, supra, at 326.

The petitioner contends that the Eighth Circuit erred in two distinct ways in denying the *Kills Crow* appeal and using that case as authority to deny the petitioner's. First, it ignores that the petitioner whatever his race is protected by the Due Process Clause. Second, it assumes that if lesser-included offense instructions are given it will do harm to the tribal courts. The second contention ignores the fact that an Indian may not be brought to Court unless indicted for one of the felonies in 18 U.S.C. 1153. Tribal Courts have no jurisdiction over these offenses. The only time that the tribal courts would in any way be affected is if on the trial of a felony the United States was unable to offer enough evidence on the greater charge. If the lesser offense is one which the tribe has jurisdiction, the Federal Courts may usurp some authority. But to use this as a controlling factor in such a due process situation, must fail.

In 1959, Mr. Justice Frankfurter wrote for the Court:

> Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and

environed by the best safeguards for disinterestedness and detachment." *Bartkus v. Illinois*, 359 U.S. 121, 128, 79 S.Ct. 676, 680 (1959).

The Due Process Clause protects the petitioner as an individual and subjects him to the "law of the land." No more or less than any other person.

Congress is not a body of trial lawyers with ability to predict every ramification of a statute on the actual trial of a case. It clearly did not wish to create the crazy quilt mode of trial demanded by the Eighth Circuit in *Kills Crow* and *Keeble*. This Court in *Ex Parte Gon-Shay-ee*, 130 U.S. 343, 353, 9 S.Ct. 543, 546 (1889) noted the importance of the "mode of trial." The Court noted such elements as venue and jury selection. The petitioner contends that jury instructions are in no way less important. The Court was aware that the assumption of jurisdiction over Indians by the Federal Government intended no procedural disadvantage:

> It is of consequence that in this new departure which Congress has made, of subjecting the Indians, in this limited class of cases, to the same laws which govern the whites within the territories where they both reside, the Indian shall at least have all the advantages which may accrue from that change, which transfers him, as to the punishment for these crimes, from the jurisdiction of his own tribe to the jurisdiction of the government .... *Ex Parte Gon-Shay-ee*, 130 U.S. 343, 353, 9 S.Ct. 543, 546 (1889).

The Eighth Circuit's concept of protection of the tribe's authority over lesser offenses as more important than the petitioner's individual rights is not universally accepted as proper judicial reasoning. The Court in *Ex Parte Gon-Shay-ee* was concerned with individual rights not tribal.

Judge Stephenson wrote dissenting in *Kills Crow*:

> Whatever may be the soundness and contemporary vitality of the 'guardian and ward' concept in other contexts of the relationship between the Indian and the federal government, I am unpersuaded by the notion that such a theory can furnish a plausible predicate for the conclusion that because Arnold Francis Kills Crow is an Indian there is a rational basis for extending him less than full Fifth Amendment Due Process treatment. I think, contrarily, that such a conclusion runs afoul of the well established principle of Supreme Court decisional law that the Fifth Amendment proscribes discrimination that is 'so unjustifiable as to be violative of due process' *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). *Kills Crow v. United States*, 451 F.2d 323, 328 (8th Cir. 1971), cert. denied 405 U.S. 999, 92 S.Ct. 1262 (1972).

Judge Stephenson's view is that the refusal to instruct on lesser offenses is a denial of "a fundamental Due Process right." *Kills Crow*, supra, at 328. This Supreme Court has not so declared but the petitioner contends that Judge Stephenson's view is correct.

To the petitioner's knowledge, no lower court has considered the importance of 18 U.S.C. 3242 in deciding whether or not Congress intended for Indians to be tried as all others in Federal Court. As mentioned prior, 18 U.S.C. 1153 and 18 U.S.C. 3242 were part of the original jurisdiction granting bill, 23 Stat. 385. The wording of 18 U.S.C. 3242 clearly does not support the Eighth Circuit's contention that as to lesser-included offense instruction due process was to be ignored. Congress declared in 18 U.S.C. 3242 that: "All Indians . . . shall be tried in the same courts, and in the same manner, as are all other

persons committing . . . crimes within the exclusive jurisdiction of the United States.

Indian persons although also United States citizens can not make an election of whether to be tried as an Indian or not. *See: United States c. Celestine*, 215 U.S. 278, 30 S.Ct. 93 (1909). On the other hand, adoption into an Indian tribe can not for criminal jurisdictional purposes change the status of a non-Indian. *See: Westmoreland v. United States*, 155 U.S. 545, 15 S.Ct. 243 (1894). Francis Keeble must be tried as an Indian under 18 U.S.C. 1153 but he must be given the protection of the Constitution.

"Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777 (1946). The petitioner contends that the Eighth Circuit erred by affirming the District Court's refusal to instruct on lesser offenses. The instruction should have been given. Congress intended that it should be given; the Criminal Rules direct that it should be given; Due Process requires that it be given; and justice in the American Federal system demands that it be given in this case.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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Dated January 17, 1973

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision and statutes involved	2
Statement	4
Summary of argument	8
Argument:	
I. The trial court properly declined to give the requested instruction because the court had no statutory jurisdiction over the offense of simple assault	9
II. The decision by congress not to extend federal jurisdiction under the major crimes act to unspecified lesser offenses does not deny due process to Indians charged under the act	19
A. The Major Crimes Act does not invidiously discriminate against Indians	19
B. This court has never recognized a constitutional right to an instruction on a lesser included offense and should not create such a right in this case	23
Conclusion	28

CITATIONS

Cases:	
Berra v. *United States*, 351 U.S. 131	25
Bolling v. *Sharpe*, 347 U.S. 497	20

496-858—73——1

Cases—Continued

	Page
Crow Dog, Ex parte, 109 U.S. 556	11, 20
Henry v. *United States*, 432 F. 2d 114, certiorari denied, 400 U.S. 1011	13
Hunter v. *Erickson*, 393 U.S. 385	20
Katzenbach v. *Morgan*, 384 U.S. 641	23
Kelly v. *United States*, 370 F. 2d 227, certiorari denied, 388 U.S. 913	24
Kennerly v. *District Court of Montana*, 400 U.S. 423	10, 22
Kills Crow v. *United States*, 451 F. 2d 323, certiorari denied, 405 U.S. 999	7, 20
Korematsu v. *United States*, 323 U.S. 214	20
McCord, Petition of, 151 F. Supp. 132	14
McGinnis v. *Royster*, No. 71–718, decided February 21, 1973	23
Menominee Tribe v. *United States*, 391 U.S. 404	10, 22
Sansone v. *United States*, 380 U.S. 343	24
Sparf and Hansen v, *United States*, 156 U.S. 51	24, 25
Spies v. *United States*, 317 U.S. 492	25
Talton v. *Mayes*, 163 U.S. 376	10
Todd v. *United States*, 158 U.S. 278	14
United States v. *Davis*, 429 F. 2d 552	14
United States v. *Jacobs*, 113 F. 2d 203	14
United States v. *Joe*, 452 F. 2d 653, certiorari denied, 406 U.S. 931	14
United States v. *Kagama*, 118 U.S. 375	20
United States v. *Nardello*, 393 U.S. 286	4
United States v. *Red Wolf*, 172 F. Supp. 168	14
United States v. *Rider*, 282 F. 2d 476	11, 14
United States v. *Sharpnack*, 355 U.S. 286	4
United States v. *Quiver*, 241 U.S. 602	10
United States ex rel. De Flumer v. *Mancusi*, 443 F. 2d 940	25, 26, 27

Cases—Continued Page
Williams v. *Lee*, 358 U.S. 217 ..... 20, 21
Worcester v. *State of Georgia*, 6 Pet. 515 10
Constitution, statutes, and rules:
United States Constitution, Fifth Amendment 2, 20
Act of March 3, 1885, 23 Stat. 362, as amended, 18 U.S.C. 1153 (Major Crimes Act) 2, 4, 7, 8, 9, 11, 12, 13, 18, 19, 20, 23
Indian Bill of Rights of 1968, 82 Stat. 78:
25 U.S.C. 1311–1325 21
25 U.S.C. 1321–1326 10
Wheeler-Howard Act, 48 Stat. 987, 25 U.S.C. 476, *et seq* 21
18 U.S.C. 13 18
18 U.S.C. 111 17
18 U.S.C. 113(a)–(e) 13
18 U.S.C. 1152 13
18 U.S.C. 1162 10
18 U.S.C. 2113 16
18 U.S.C. 3242 ..... 3, 18, 19
18 U.S.C. 3501 4
28 U.S.C. 1360 10
South Dakota Compiled Laws, 1967:
§ 22–18–12 ..... 4, 13
F. R. Crim. P.:
Rule 5 8
Rule 31(c) 3, 5, 16, 25
Miscellaneous:
H. Rep. 1446, 72d Cong., 1st Sess 12
H. Rep. No. 721, 89th Cong., 1st Sess 12
Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Constitutional Rights of the American Indian, S. Res. 53, 87th Cong., 1st Sess. (Part 1) 21

Miscellaneous—Continued

Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Constitutional Rights of the American Indian, S. Res. 58, 88th Cong., 1st Sess. (Part 4) ..... Page 21–22

Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Constitutional Rights of the American Indian, 89th Cong., 1st Sess 22

Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. L. 311 (1969) 23

Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343 (1969) 22–23

Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1811 (1968) 21

S. Rep. No. 721, 90th Cong., 1st Sess 12

Staff of Subcommittee on Constitutional Rights of Senate Committee on the Judiciary on Constitutional Rights of the American Indian, 89th Cong., 2d Sess. (Comm. Print 1966) 22

2 Wright, *Federal Practice and Procedure*, § 515 (1969) 24

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5323

FRANCIS A. KEEBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals remanding the case to the district court for further findings and the subsequent *per curiam* opinion affirming the conviction are reported at 459 F. 2d 757, 762, and are reproduced in the Appendix (hereinafter "A.") at pages 16-23 and 27 respectively. The opinion of the district court on remand (A. 25-26) is not reported.

JURISDICTION

The judgment of the court of appeals (A. 28) was entered on July 27, 1972. The petition for a writ of certiorari was filed on August 28, 1972, and was

granted on December 4, 1972.[1] The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's refusal to give a lesser included offense instruction under 18 U.S.C. 1153 violated the Fifth Amendment's due process guarantee.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment provides in pertinent part:

> * * * [N]or [shall any person] be deprived of life, liberty, or property, without due process of law; * * *.

18 U.S.C. 1153 (the Major Crimes Act) provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of rape and assault with intent to commit rape shall be

[1] There is some discrepancy as to whether the judgment was entered on July 27th or July 28th and thus whether the petition was precisely on time but as this is not jurisdictional we take no further note of it.

defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

18 U.S.C. 3242 provides:

All Indians committing any of the following offenses; namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Rule 31(c) of the Federal Rules of Criminal Procedure provides:

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

South Dakota Compiled Laws of 1967, § 22–18–12, provides:

> Whoever assaults another with intent to inflict great bodily injury shall be punished upon conviction thereof by imprisonment in the state penitentiary for not less than one year, nor more than five years, or in the county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

STATEMENT

Following a jury trial in the United States District Court for the District of South Dakota, petitioner, an Indian of the Crow Creek Sioux Tribe, was convicted of assault with intent to commit serious bodily injury in violation of the Major Crimes Act, 18 U.S.C. 1153, an act applicable only to specified major offenses committed by Indians within Indian country.[2] He was sentenced to five years' imprisonment. On appeal, the court initially remanded for a hearing to determine whether petitioner's confession made during a delay between petitioner's arrest and his appearance before the United States Magistrate had been voluntarily given, in accordance with 18 U.S.C. 3501 (459 F. 2d 757; A. 16–23). One Judge dissented from the remand, indicating that he would reverse on the separate issue, presented here,

[2] Petitioner has not questioned the incorporation of the South Dakota statute proscribing "assault with intent to inflict great bodily injury" under that clause of the Major Crimes Act that refers to "assault resulting in serious bodily injury." See generally, *United States* v. *Nardello*, 393 U.S. 286; *United States* v. *Sharpnack*, 355 U.S. 286.

concerning the trial judge's refusal to give a lesser included offense instruction (A. 23). Following an evidentiary hearing, the district court concluded that, although the period of delay was unreasonable, the statement was nevertheless voluntary (A. 25–26). The court of appeals then affirmed the conviction in a *per curiam* opinion (A. 27).

The evidence adduced at trial[3] showed that on the evening of March 6, 1971, petitioner was driving home with his son and his cousin Alfred Kennedy, when Robert Pomani, the brother of petitioner's wife, flagged them down and got into the truck. Petitioner, Pomani, and Kennedy had all been drinking. They went to petitioner's house (located on the Crow Creek Indian Reservation), where they drank and watched television. At Pomani's suggestion, petitioner drove the group towards the town of Reliance to buy more wine. En route, Pomani began to criticize petitioner's behavior towards petitioner's wife, saying that petitioner was not "good enough" for his sister and accusing him of adulterous relationships. Pomani wanted to fight. Reluctant to fight on the road petitioner turned towards home and the argument was temporarily forgotten while they bought a case of beer. At home, however, the argument resumed. Pomani swung at petitioner but missed and petitioner hit him in the stomach, knocked him

[3] The following account is taken from petitioner's written confession forming part of the record of the case and petitioner's testimony at trial (Tr. 212–253). "Tr." refers to the transcript of pre-trial and trial proceedings. "H." refers to the transcript of the hearing conducted on remand.

down and began to hit his face repeatedly. Kennedy tried to get involved in the fight and, despite petitioner's warnings to stay out of "his fight," succeeded in breaking a bottle over Pomani's head. Petitioner asked Pomani if he had "had enough" and Pomani, whose face and head were bleeding badly, indicated that he had. Petitioner then left him and went to bed. The next morning petitioner found Pomani dead, about fifty feet from the house.[4] In his confession, petitioner stated that "'[a]lthough I wanted to give Pomani a good beating because he is bigger than me and he had beat me many times in the past, I did not intend to beat him to death."[5]

After finding the body, petitioner told his wife he thought he had killed Pomani (Tr. 260). Petitioner and his wife then discussed the situation with his uncle (Tr. 189–192) and reported the incident to Charles Cruse, an official of the Department of the Interior serving as Captain of the Tribal Police at Fort Thompson, South Dakota, on the Crow Creek Indian Reservation (Tr. 38–39).[6] Cruse and two other

[4] Apparently Pomani was able to walk out of the house (see confession; Tr. 192), though there was some suggestion that he may have been dragged outside unconscious (Tr. 188).

[5] Petitioner's trial testimony did not differ materially from the account given in his statement, though he did deny at trial that Kennedy tried to enter the fight and hit Pomani with a bottle (Tr. 251–252).

[6] Cruse arrested petitioner for disorderly conduct (*i.e.*, public intoxication), a tribal charge, and also held him because he had reason to believe another offense had been committed (Tr. 43, 62; H. 82–83). On March 9, 1971, both petitioner and Kennedy entered pleas of guilty to disorderly conduct charges in tribal court. Each was sentenced to fifteen days' incarceration, and fined $20 (Tr. 62, 82–83).

officers went to petitioner's house; through a window and open door they observed that blood was smeared over a large area of the living room (Tr. 153–154). The prosecution introduced photographs of the interior of the house and of Pomani's swollen and discolored body (Tr. 159–164). Petitioner's bloodstained trousers and boots were also introduced into evidence (Tr. 157–159).

The doctor who performed the autopsy said that Pomani's death was due to exposure to excessive cold, but that the beating was a contributing factor (Tr. 181–182). The autopsy revealed lacerations "through the whole thickness of the scalp" (produced by blows from a hard blunt instrument), a massive bruising of the face, various other bruises and abrasions, some collapse of the lungs, and an accumulation of fluid in the brain and lungs (Tr. 182–183). Except for the lung condition, all injuries had been caused by the beating (Tr. 183).

At the conclusion of the trial, petitioner requested that the trial judge instruct the jury that they could acquit petitioner of the charge against him and instead convict him of "simple assault" as a lesser included offense. The court refused the instruction on the ground that it had no jurisdiction over the crime of simple assault since that crime was not included in the Major Crimes Act, 18 U.S.C. 1153, noting that simple assault is "a matter for the tribe" (A. 15; Tr. 334). The court of appeals affirmed the district court's ruling on this issue, relying on its prior opinion in *Kills Crow* v. *United States* 451 F. 2d 323 (C.A. 8), certiorari denied, 405 U.S. 999, which held that in the

Major Crimes Act, Congress specifically and exclusively set forth offenses committed within Indian country for which Indians may be tried in federal courts, and that it would be contrary to the legislative intent to create additional federal crimes not there specified. This Court granted certiorari limited to that issue.[7]

SUMMARY OF ARGUMENT

I. The Major Crimes Act, 18 U.S.C. 1153, creates federal jurisdiction over certain specified crimes committed by Indians within Indian country. Unless otherwise provided by Congress, the Indian tribes retain jurisdiction over crimes committed by Indians within Indian country not listed in the Major Crimes Act. The Act lists assault resulting in serious bodily injury as one of the crimes over which federal courts have jurisdiction but does not list simple assault as such a crime. An offense cannot be considered a "lesser included offense" if the court has no jurisdiction over that lesser offense and thus has no power to try it or punish it. The district court was therefore correct in refusing to instruct on simple assault as a lesser included offense. The history of the Major Crimes Act and the particularity with which Congress has granted jurisdiction to federal courts supports this position.

II. The decision of Congress to grant only limited jurisdiction to federal courts over crimes committed by Indians within Indian country does not deny due

[7] The petition for certiorari also raised the question whether the introduction of the confession violated Rule 5 of the Federal Rules of Criminal Procedure.

process to Indians tried under the Major Crimes Act. The scheme of the Act is not one of invidious discrimination but of preserving the jurisdiction of tribal courts. This is a recognition of a valid Indian interest, not a discrimination against Indians.

A lesser included offense instruction necessarily cuts two ways. It allows a jury to convict when it would otherwise have to acquit. It also allows the defendant the benefit of a compromise verdict. This court has never raised such an instruction to the level of a constitutional right. It would be inappropriate to do so in a case such as this where the failure to instruct on a lesser offense is a requirement of maintaining appropriate limitations on the jurisdiction of the court where the charge is brought. Moreover, the petitioner has not been prejudiced by refusal of the court to grant the requested instruction.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DECLINED TO GIVE THE REQUESTED INSTRUCTION BECAUSE THE COURT HAD NO STATUTORY JURISDICTION OVER THE OFFENSE OF SIMPLE ASSAULT

The government's position on the "lesser included offense" request in this case is that an offense cannot be considered a "lesser" offense "included" in the crime charged if the court has no jurisdiction over that less serious offense, and thus no power to try it or punish it. Under the statutory system Congress has established, a federal court has only limited jurisdiction over crimes committed by Indians within Indian reservations, with all other offenses being re-

served to tribal courts.[8] Thus, the trial judge here acted properly—indeed, necessarily—in declining to instruct the jury that it could convict petitioner of simple assault, a crime Congress has left to the historic jurisdiction of the Indian tribal courts.

1. It has long been settled that, except where withdrawn by Congress in the exercise of its constitutional powers, jurisdiction over criminal offenses by Indians in Indian country remains with the Indian tribe. This jurisdiction can be withdrawn either by a congressional act granting such jurisdiction to the State,[9] or as here, by an act assuming jurisdiction for the United States. In either event the statute is to be construed so as to take away no more jurisdiction than Congress has clearly intended. See *Kennerly* v. *District Court of Montana,* 400 U.S. 423. See also *Menominee Tribe* v. *United States,* 391 U.S. 404.

In the absence of the explicit withdrawal of jurisdiction by Congress, the power to try and punish criminal behavior by Indians within Indian country inheres in tribal courts. The jurisdiction of these tribal courts does not depend upon an express grant of power from Congress but is a residual power of tribal sovereignty often expressly recognized by treaty. See *Worcester* v. *State of Georgia,* 6 Pet. 515; *Talton* v. *Mayes,* 163 U.S. 376; *United States* v. *Quiver,* 241 U.S. 602, 605. These principles have been

[8] Except where Congress has established state jurisdiction. See note 9, *infra.*

[9] See *e.g.*, 18 U.S.C. 1162; 28 U.S.C. 1360; 25 U.S.C. 1321–1326.

so firmly recognized that in 1883 this Court held that federal courts had no jurisdiction over the murder of an Indian by another Indian on a reservation, because Congress had never clearly withdrawn such jurisdiction from the sovereign tribe. *Ex parte Crow Dog,* 109 U.S. 556. Against the background of that decision, Congress passed the Major Crimes Act (Act of March 3, 1885, 23 Stat. 362, 385) which made it a federal crime for an Indian to commit any of seven named major offenses against another Indian on an Indian reservation.[10] That is the statute, 18 U.S.C. 1153 as amended, which formed the basis for petitioner's prosecution in a federal court.

2. The history of amendments to the original act shows that when Congress has sought to expand the federal court reach of the Act, it has done so specifically. After carnal knowledge was held not to be within the term rape as used in the Major Crimes Act,[11] Congress amended the statute to include that offense expressly.[12] Contrary to petitioner's interpretation, the amendment does not indicate that Congress intended federal jurisdiction to extend similarly to simple assault (Brief p. 16); indeed, the failure to designate certain offenses that might be thought of as "lesser included offenses" of those crimes listed, while naming other subordinate offenses specifically,

[10] The offenses were murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny. The act also made it a federal crime for an Indian to commit any of these acts off a reservation if the reservation were in a territory rather than a state.

[11] *United States* v. *Rider*, 282 F. 2d 476 (C.A. 9).

[12] Act of November 2, 1966, 80 Stat. 1100.

shows a congressional policy limiting federal jurisdiction to the crimes named. The inclusion of carnal knowledge of a minor and the exclusion of simple assault are consistent with the purpose of the act: to give federal courts jurisdiction over major offenses but not to intrude on exclusive tribal jurisdiction when only relatively minor misconduct is involved. As to more serious crimes, such as carnal knowledge, Congress in recent years has regarded the tribes as unable to impose adequate sanctions.[13] As late as 1968, Congress added to the Major Crimes Act the offense of assault resulting in serious bodily injury. Once again the dominant expressed purpose as reflected by legislative history was to insure that "serious" crimes be punished "in proportion to the gravity of the offense."[14]

3. The Major Crimes Act in its present form enumerates thirteen major crimes over which federal courts have exclusive jurisdiction when a crime is committed by an Indian in Indian country. The Act is specific as to the kinds of assaults as to which it creates federal jurisdiction: assault with intent to kill, assault with intent to commit rape, assault with a dangerous weapon, or assault resulting in serious bodily injury

[13] See H. Rep. No. 721, 89th Cong., 1st Sess., p. 6. When new offenses were added in 1932, the House Committee on Indian Affairs also noted a statutory purpose to punish an Indian for "major" crimes since tribal sanctions were insufficient. H. Rep. No. 1446, 72d Cong., 1st Sess., p. 1.

[14] S. Rep. 721, 90th Cong., 1st Sess. (Report to accompany H.R. 2516).

(see *supra*, ,pp. 2–3).[15] Simple assault is not included.[16]

The Major Crimes Act makes no reference to federal jurisdiction over "lesser included offenses" except those listed in the statute itself. Thus, manslaughter, separately listed, is generally considered a lesser included offense of murder, which is also listed. A similar relationship exists between carnal knowledge and rape, now both specifically covered. And of course, depending on the facts, several of the "assault" crimes specifically mentioned in the Act could be viewed as lesser offenses included in others. This enumeration of offenses which Congress wanted to make triable in federal courts tends to confirm that Congress did not assume or intend that crimes that might *generally* be thought of as lesser included offenses would come within this narrow

[15] The Act provides that the offense of assault resulting in serious bodily injury and various other named offenses shall be "defined and punished in accordance with the laws of the State in which such offense was committed." South Dakota Compiled Laws, 1967, 22–18–12, prescribes penalties of imprisonment from one to five years (and/or a fine not exceeding $500) for assault "with intent to inflict great bodily injury." Petitioner received the maximum imprisonment under this statute, five years.

[16] If the defendant were a non-Indian charged with an aggravated assault the case would be governed by federal enclave law pursuant to 18 U.S.C. 1152 (see *Henry* v. *United States*, 432 F. 2d 114, 118 (C.A. 9), certiorari denied, 400 U.S. 1011). Since federal enclave law proscribes a wide variety of assaults, including simple assault (see 18 U.S.C. 113(a)-(e)), the district court could instruct as to a lesser included offense. The difference between the two results, is, of course, a manifestation of congressional concern for preserving tribal court jurisdiction over Indian defendants, a consideration that does not apply to non-Indian defendants. See pp. 20–23, *infra*.

406-858—73——2

definition of federal criminal jurisdiction simply because the greater offenses are covered. As the Court of Appeals for the Tenth Circuit recently held in a similar setting (*United States* v. *Joe*, 452 F. 2d 653, 654, certiorari denied, 406 U.S. 931):

> * * * The Statute does not look to State law for the purpose of making its lesser included State offenses Federal offenses proscribed by the Statute. The sole purpose of looking to State law under the Statute is to obtain the definition of the offense * * * and only the definition. This interpretation is not only compelled by the plain language of the Statute but is also required by the fact that in enacting the Statute, Congress specifically included certain lesser included offenses and is deemed to have done so to the exclusion of all others else they would also have been named [footnote omitted].

Moreover, it is long established that there are no federal crimes except those created by statute. To interpret the Major Crimes Act to include other offenses, not explicitly listed, would conflict with established principles of construing criminal statutes, see *Todd* v. *United States*, 158 U.S. 278, 282, and with a long line of decisions holding specifically that the Major Crimes Act cannot be extended by implication to offenses not enumerated. See *United States* v. *Davis*, 429 F. 2d 552 (C.A. 8); *United States* v. *Rider*, 282 F. 2d 476 (C.A. 9); *United States* v. *Red Wolf*, 172 F. Supp. 168 (D. Mont.); *Petition of McCord*, 151 F. Supp. 132 (D. Alas.); *United States* v. *Jacobs*, 113 F. Supp. 203 (E.D. Wis.). This general principle of statutory construction is especially compelling

here where strict construction protects a well-defined and historic congressional policy to limit the assumption of power over Indian crimes to a few compellingly important categories. Simple assault is not one of the offenses that Congress has authorized the federal courts, in the Indian setting, to deal with.

4. We think the force of the foregoing discussion is clear: since Congress has chosen not to make the offense of simple assault a matter for trial in the federal courts, but has instead left this minor offense to the exclusive jurisdiction of the courts of a separate sovereign—the Indian tribes—the lesser included offense doctrine cannot be utilized to bring that offense into the federal court.

Rule 31(c) of the Federal Rules of Criminal Procedure, which codifies the general principles surrounding the permissible consideration by the jury of crimes other than those expressly charged in the indictment, provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged * * *.

Petitioner, in his brief (p. 19) lists five conditions that must be satisfied before a defendant is entitled to have the jury told that it may return a guilty verdict for a crime other than the one charged. Most pertinent here is the requirement of "mutuality"—that the prosecution has an equal right to demand a lesser included offense instruction if the defense has such a right. But it would undermine the statutory system that Congress has carefully and delicately established to allow the government to prosecute in the

federal courts petty offenses like simple assault committed by Indians on Indian reservations. We claim no such power to initiate prosecution for simple assault in these circumstances, and it seems to be too clear a principle to admit of dispute that if the offense could not be charged initially as an independent (or exclusive) count it cannot be considered legally "included" in the offense actually charged. Thus, even though simple assault is a less serious offense than aggravated assault and includes some but not all of the elements of the more serious crime, it is not necessarily a "lesser included offense" within the meaning of Rule 31(c) or the general doctrine. Where, as here, there is a jurisdictional barrier between the greater and lesser offenses, neither the defense nor the prosecution can validly ask for a trial or verdict on what in other contexts might be a "lesser included offense." Some analogies will illustrate this point.

Consider the case of a bank robbery. Under its commerce, tax, and currency powers Congress could no doubt make every bank robbery a federal offense. But in 18 U.S.C. 2113, Congress has expressed its determination to carve out a narrower field of federal jurisdiction and has provided that only robberies of national banks or banks that belong to the Federal Reserve System or are insured by the Federal Deposit Insurance Corporation can be prosecuted in a federal court. If the United States Attorney in a federal bank robbery trial feared that the evidence of FDIC insurance, for example, might be insufficient, could he insist upon an instruction to the jury that if it finds beyond a reasonable doubt that all the ele-

ments of bank robbery except the FDIC-insurance element have been proved, it may return a verdict of guilty under a state bank robbery or armed robbery statute? We think not. Conversely, under the principle of mutuality and as a matter of jurisdictional principles, no matter how beneficial to his interest the defendant might consider it (as for example, in seeking a compromise verdict on an offense that might carry a lighter sentence), the defendant would have no right to request or to receive an instruction terming the state violation a "lesser included offense," and any verdict resting upon such an analysis would be void.

Similarly, assault on a federal officer "while engaged in or on account of the performance of his official duties" is a serious federal felony under 18 U.S.C. 111. If the prosecutor sensed that he had not sufficiently proved performance of federal duties, he could not seek a simple assault conviction under the relevant state provision; nor could the defense in an effort to avoid conviction on the felony urge the submission of a "simple assault" instruction on the theory, similar to the one proposed by petitioner, that it is a "lesser offense" "included" in the crime Congress has chosen to cover as a federal offense.

In the foregoing illustrations, both the prosecution and the defense must accept the reality that, for jurisdictional reasons, it is "all or nothing at all"—the verdict must be either "guilty as charged" or outright acquittal. The same conclusion, we submit, must be reached here. Since Congress has carefully restricted the specific crimes it has authorized to be

tried in federal courts rather than left to tribal concern, the "lesser included offense" doctrine does not apply so as to expand the scope of federal jurisdiction.

5. Finally, we note that nothing in 18 U.S.C. 3242, the procedural statute that lists the Indian offenses that are triable in federal courts, alters that conclusion. Petitioner notes that 18 U.S.C. 3242 provides that Indians committing the specified offenses [17] shall be tried "in the same courts, *and in the same manner*" (emphasis supplied) as all other persons committing such crimes "within the exclusive jurisdiction of the United States." From this he seeks to argue, as we understand it, that a non-Indian charged under a statute like the Assimilative Crimes Act, 18 U.S.C. 13, would be subject to *all* the substantive criminal laws of the state and thus could invoke the lesser-included-offense doctrine to bring himself within included state offenses. From the language of Section 3242, he suggests that he is entitled to be tried "in the same manner" as such a defendant, even though the Major Crimes Act reflects a totally different congressional approach to the purposes and extent of federal criminal jurisdiction than does the

[17] 18 U.S.C. 3242 enumerates all of the offenses specified in the Major Crimes Act except the most recent addition, "assault resulting in serious bodily injury"—the basis of the present charge. The omission is probably a congressional oversight. The general jurisdictional provision in 18 U.S.C. 3231, creating original jurisdiction in the district courts to entertain prosecutions "of all offenses against the laws of the United States" is broad enough to cover violations of the Major Crimes Act, 18 U.S.C. 1153.

Assimilative Crimes Act. The short answer to this contention is that the clause of Section 3242 to which petitioner points simply provides that the ordinary trial procedures apply in Indian cases. It does not purport to expand the list of offenses made triable.

For these reasons, the trial judge was correct when he viewed himself as without statutory authority to suggest to the jury that it could return a verdict on an offense—simple assault—not included by Congress in the Major Crimes Act.

II

THE DECISION BY CONGRESS NOT TO EXTEND FEDERAL JURISDICTION UNDER THE MAJOR CRIMES ACT TO UNSPECIFIED LESSER OFFENSES DOES NOT DENY DUE PROCESS TO INDIANS CHARGED UNDER THE ACT

Petitioner makes several related constitutional challenges to the Major Crimes Act to the extent that it does not permit consideration of what might otherwise be regarded as lesser included offenses. We shall demonstrate that the system designed by Congress represents a fair and rational classification that does not invade any constitutionally protected rights.

A. THE MAJOR CRIMES ACT DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST INDIANS

Petitioner contends that, because one of the factors that controls the application of the special criminal provisions of the Major Crimes Act is his status as an Indian (the other being the locus of the crime in the Indian country), the statutory classification is unconstitutionally based on race.

While racial classifications are constitutionally suspect, *Korematsu* v. *United States,* 323 U.S. 214, 216; *Hunter* v. *Erickson,* 393 U.S. 385, 391–393, and may amount to a violation of due process of law under the Fifth Amendment, *Bolling* v. *Sharpe,* 347 U.S. 497, 499, there is no such invidious discrimination here. If the petitioner in this case committed a crime outside Indian country he would be subject to the laws of the state and the nation identically to any other citizen. The Major Crimes Act, which rests in part on the special congressional power over Indian reservations, reflects no racial discrimination against Indians. The Act merely manifests congressional concern that a narrow class of Indian crimes should be federalized, while at the same time continuing the general policy of deference to tribal jurisdiction over Indians in Indian country, a jurisdiction recognized by this Court in numerous decisions, *e.g., Ex parte Crow Dog,* 109 U.S. 556; *United States* v. *Kagama,* 118 U.S. 375; *Williams* v. *Lee,* 358 U.S. 217. Denying federal courts jurisdiction over lesser included offenses in this situation is a recognition of valid Indian interests, not a discrimination against Indians.[18]

[18] The centrality of tribal courts to the preservation of Indian cultural and political identity has been amply documented in opinions and commentaries. See *Kills Crow* v. *United States,* 451 F. 2d 323 (C.A. 8), certiorari denied, 405 U.S. 999. Several justifications have been advanced for maintaining an independent system of tribal courts. Effective application of Indian law, which in comparison to federal and state systems shows a stronger inclination to "restitutive" rather than "retributive" justice, may well call for a specialized judge capable of performing the arbitral duties of the tribal elder. Many Indians also feel that they will receive more equitable treatment in Indian courts than in others. Furthermore, many Indians see tribal

The primary purpose in limiting federal jurisdiction to the specified serious offenses listed in the Major Crimes Act is to allow tribal courts to adjudicate all other offenses, a power which Congress and this Court have traditionally regarded as important to the preservation of tribes as self-governing units. The federal government's Indian policy, though protective of the opportunity for assimilation, has recognized the desirability of supporting tribal self government. See, *e.g.*, Wheeler-Howard (Indian Reorganization) Act, 48 Stat. 987, 25 U.S.C. 476, *et seq.* The tribal court system is an important part of this self government. See *Williams* v. *Lee*, *supra*. A continuing Indian and congressional concern for the preservation of the jurisdiction of tribal courts is apparent in the passage of the Indian Bill of Rights in 1968, 82 Stat. 78, 25 U.S.C. 1311–1325, requiring Indian consent for further cessions of jurisdiction to the states and strengthening the procedures of tribal courts.[19]

justice as reflecting a unique concern for the individual defendant, as evidenced, for example, by the relaxed procedures for granting pre-trial release on personal recognizance. Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1834–1837 (1968). See Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on the Constitutional Rights of the American Indian, S. Res. 53, 87th Cong., 1st Sess. (Part I), pp. 15–16 (1961).

[19] The Senate Committee responsible for the Indians Bill of Rights Act, continually inquired whether the Bill's criminal procedural standards would excessively burden tribal courts. See *e.g.*, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Constitutional Rights of the American Indians, S. Res. 53, 87th Cong., 1st Sess. (Part 1), pp. 99, 147 (1961); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Constitutional Rights of the American Indian, S. Res. 58, 88th Cong., 1st Sess. (Part 4), pp. 873–875 (1963).

The extension of federal jurisdiction under the Major Crimes Act to minor offenses such as simple assault, even if restricted to instances where a federal court has jurisdiction over a greater offense, necessarily increases the jurisdiction of federal courts and diminishes the heretofore exclusive jurisdiction of tribal courts over the lesser offenses. The ruling petitioner seeks would, under the principle of mutuality, empower federal prosecutors, dissatisfied with the leniency of tribal courts, to prosecute in marginal cases, knowing that if the major offense is not proved the penalty for the minor offense would be more substantial than in the tribal courts. See note 13, *supra.* This Court has recently expressed its unwillingness to interpret an act of Congress as depriving an Indian tribe of jurisdiction over its people except to the extent and in the fashion clearly provided by Congress. *Kennerly* v. *District Court of Montana,* 400 U.S. 423; see also, *Menominee Tribe* v. *United States,* 391 U.S. 404..

Under these circumstances, the decision by Congress to withdraw jurisdiction from Indian tribes

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Significantly, the committee rejected proposals that the Bill require non-establishment of religion and prohibitions of racial classifications in voting for fear that such requirements would threaten the cultural autonomy of the tribes. See Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Constitutional Rights of the American Indian, 89th Cong., 1st Sess., pp. 18, 21, 221 (1965); Staff of Subcommittee on Constitutional Rights of Senate Committee on the Judiciary on Constitutional Rights of the American Indian, 89th Cong., 2d Sess., pp. 9–11 (Comm. Print 1966); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343 (1969). See also, Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. L. 311, 328 (1969).

only on a limited basis is proper and reasonable. The problem of defining the respective spheres of federal and tribal jurisdiction is a sensitive and difficult one. As this Court recently explained in rejecting an "invidious classification" contention in *McGinnis* v. *Royster,* No. 71–718, decided February 21, 1973 (41 U.S.L.W. 4259, 4263), "legislative solutions must be respected if the 'distinctions drawn have some basis in practical experience,' *South Carolina* v. *Katzenbach,* 383 U.S. 301, 331 (1966), or if some legitimate state interest is advanced. *Dandridge* v. *Williams,* 397 U.S. 471, 486 (1970)." Measured by these standards, an Indian's ineligibility for lesser-included-offense consideration under the Major Crimes Act is compatible with due process concepts of non-discrimination.[20]

B. THIS COURT HAS NEVER RECOGNIZED A CONSTITUTIONAL RIGHT TO AN INSTRUCTION ON A LESSER INCLUDED OFFENSE AND SHOULD NOT CREATE SUCH A RIGHT IN THIS CASE

1. The lack of statutory authority for a federal trial court to permit the jury to consider a lesser offense not specified in the Major Crimes Act satisfies the "fundamental fairness" test of the due process clause. This Court for good reason has never held that a defendant has a constitutional right to a "lesser included offense" limitation.

Instructions on lesser included offenses necessarily cut two ways. They permit a jury to convict the defendant of a crime even though the elements of

[20] To the extent that the safeguarding of tribal jurisdiction over minor offenses is intended to benefit Indians, the problem presented in the instant case is analogous to cases involving a "benign" racial classification. Cf. *Katzenbach* v. *Morgan,* 384

the crime specifically charged in the indictment have not been proved. If the jury strictly obeys its oath in assessing the original charge there is no advantage for the defendant in such an instruction, since he would otherwise go free. From the defendant's standpoint, the interest in requesting a lesser included offense instruction must necessarily be a hope that the jury will return a compromise verdict rather than fulfill its duty to say "guilty" or "not guilty" to the offense charged, depending only on the sufficiency of the proof of that crime beyond a reasonable doubt. In addition, such an instruction permits the jury to invade the sentencing province of the judge by convicting of the lesser offense in order to achieve a lesser penalty, even though all the elements of the major offense have been proved.

The lesser-included-offense doctrine developed as an aid to the prosecution, since it permitted convictions on lesser included crimes that could not subsequently be prosecuted without offending the double jeopardy clause. See *Sparf and Hansen* v. *United States,* 156 U.S. 51, 63–64; *Kelly* v. *United States,* 370 F. 2d 227 (C.A.D.C.), certiorari denied, 388 U.S. 913. See also 2 Wright, *Federal Practice and Procedure,* § 515, pp. 371–375 (1969). Now the defendant may invoke the doctrine but not in a situation in which the prosecutor cannot invoke it. *Kelly* v. *United States, supra,* 370 F. 2d at 229. This Court has seldom ruled on the doctrine and then only in the context of determining congressional intent under particular stat-

U.S. 641, in which this Court upheld a Congressional distinction in voting rights depending upon education in non-English schools in Puerto Rico.

utes. See *Sansone* v. *United States,* 380 U.S. 343; *Berra* v. *United States,* 351 U.S. 131; *Spies* v. *United States,* 317 U.S. 492; see also *Sparf and Hansen* v. *United States, supra.* Although general practice and Rule 31(c) of the Federal Rules of Criminal Procedure now sanction defense requests for such instructions as providing the defense with an additional tactical option, this privilege has not been regarded as essential to a fundamentally fair trial.

The constitutionality of precluding consideration of what might be lesser included offenses in certain kinds of prosecutions has rarely been litigated. We discussed above (pp. 16–18) some instances of divided jurisdiction that justify, even if they do not compel, the refusal to consider less serious crimes than the one charged. A similar lack of statutory power to instruct on a lesser included offense can occur when a juvenile has committed a serious offense. This was the situation before the Court of Appeals for the Second Circuit in *United States ex rel. De Flumer* v. *Mancusi,* 443 F. 2d 940. Under New York law a juvenile could be held criminally liable only for a few serious acts punishable by death; other offenses were considered non-criminal juvenile delinquency. A juvenile who had hanged a small child pleaded guilty to second degree murder. Later, on a petition for habeas corpus, he argued that the consequence of New York's restricted definition of juvenile criminality was that a juvenile defendant could be convicted of murder in the first or second degree but could not be convicted of manslaughter even though an older defendant would have the possibility of urging manslaughter as a lesser included

offense. The juvenile contended that his plea of guilty to second degree murder was motivated by this allegedly unconstitutional discrimination and should be set aside. The Second Circuit rejected the argument that the New York system was unconstitutional. The court first observed that it could not assume that the absence of the possible compromise verdict of manslaughter works to the defendant's detriment; rather, the system is legally neutral because it can result in an outright acquittal as well as conviction of a lesser offense. The court then suggested that if a defendant felt disadvantaged by the absence of the lesser offense instruction he could request that the jury be told (444 F. 2d at 942):

> * * * that if the jury should find the elements of the crime of manslaughter alone, it should return a verdict of acquittal. The jury, however, could also be told that the defendant would remain liable to treatment as a juvenile delinquent. * * *

In the present case, the limitation on the verdicts that can be returned is not designed to protect residual state jurisdiction, or to preserve a separate system of juvenile courts, but is to protect the jurisdiction of tribal courts. Although the objectives vary slightly, the legislative decision to preclude lesser-included-offense treatment, as held in *Mancusi,* fully comports with the due process clause.

2. Petitioner has not been prejudiced by the refusal of the instruction he requested.

We note at the outset that the evidence at trial clearly permitted a jury to find the requisite intent,

the element distinguishing the crime charged from simple assault. Especially persuasive on this point were the severity of the beating, as evidenced by the visible damage to the victim's body, and petitioner's own statement that he "wanted to give Pomani a good beating." The trial judge properly instructed the jury on the element of intent. The jury thus had the relevant criteria in mind when finding petitioner guilty beyond a reasonable doubt. Significantly, Alfred Kennedy, petitioner's accomplice at the time of the assault, was convicted by a separate jury of the same charges. In the opinion of the trial judge, expressed at the sentencing, petitioner was even "more guilty" than Kennedy (Tr. 342).

If the jury had not found petitioner guilty of the crime charged, there is no reason to believe that it would have convicted him. The only advantage petitioner could have received from a lesser included offense instruction is that the jury, faced with an extra alternative, might have rendered a compromise verdict of simple assault. That is, petitioner's argument is grounded on the assumption that given the choice between conviction of the greater offense and acquittal, the jury might opt for conviction out of a sense that acquittal cannot be tolerated under these facts. Petitioner, however, could have employed other measures substantially equivalent in psychological effect to the giving of a lesser included offense instruction but consonant with the jurisdiction of the court as suggested in *United States ex rel. De Flumer* v. *Mancusi, supra*. He could have pointed out to the jurors—by way of closing argument or by requesting an instruc-

tion from the court—that the federal court has jurisdiction only over the major offense; that if they should find the elements only of simple assault, a verdict of acquittal must be returned; that he would not necessarily go unpunished if they found him innocent of the crime charged; and that as to any lesser crime, such as simple assault, the decision is reserved to another tribunal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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MARCH 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973